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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 75.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, PETITIONERS,

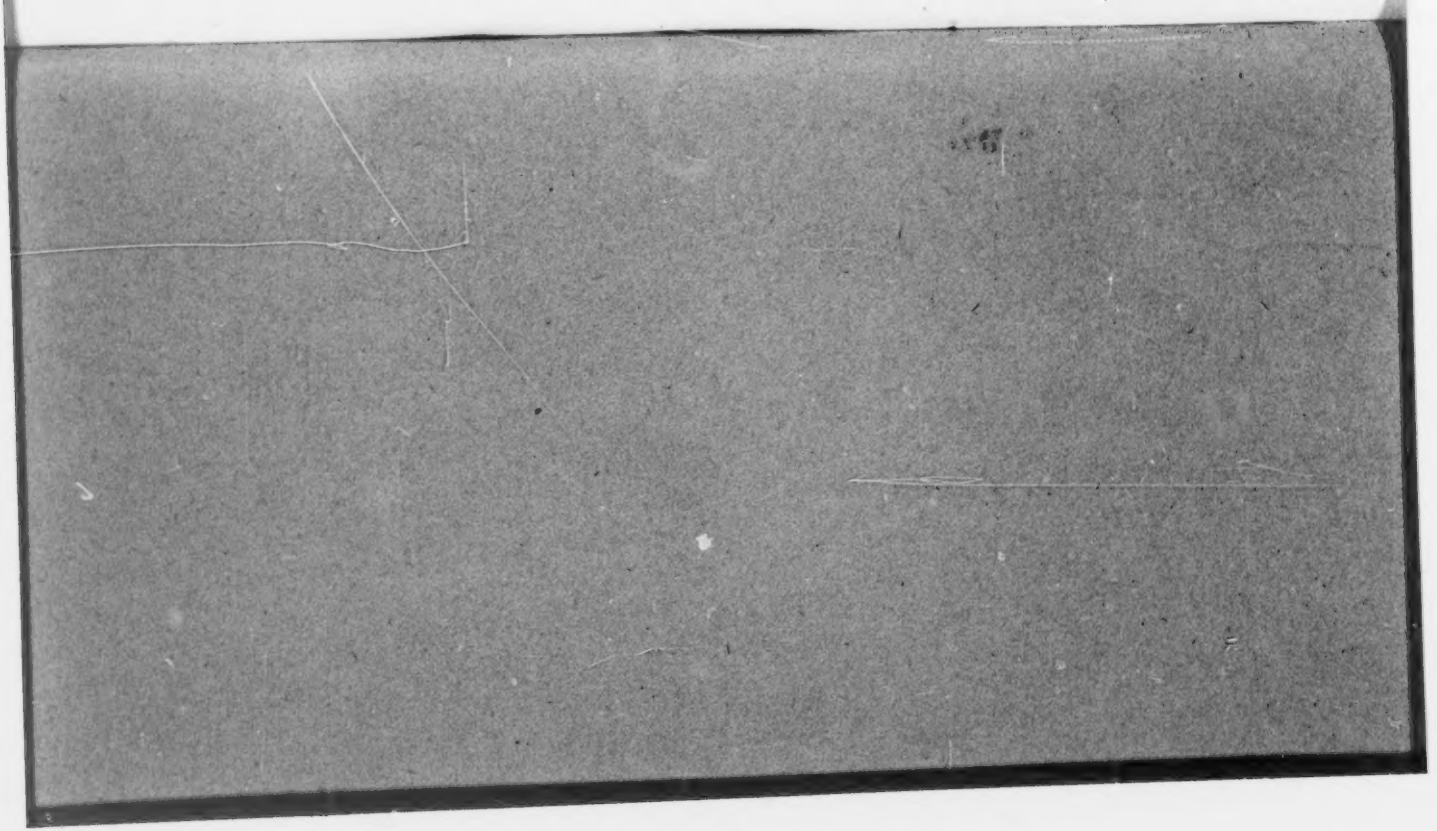
vs.

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE; A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

CERTIFICATE FILED AUGUST 8, 1904.
WRIT OF CERTIORARI GRANTED OCTOBER 16, 1905.

(19,436.)



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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA, } to-wit:

At a Circuit Court of the United States for the Western District of North Carolina, begun and held at the Courthouse in the city of Greensboro, on the 27th day of February, in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable Charles H. Simonton, Circuit Judge, and the Honorable James E. Boyd, District Judge, Judges of the Western District of North Carolina:

Among others were the following proceedings, to-wit:

The Guardian Trust and Deposit Company
versus
The Greensboro Water Supply Company.

BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(2) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company
Complainant,
vs.
The Greensboro Water Supply Company,
Defendant.

To the Honorable the Judges of said Court.

The bill of complaint of the Guardian Trust and Deposit Company, a body corporate, respectfully shows and avers and states unto your Honors:

First. That the complainant, your orator, is a body corporate, duly incorporated under an Act of Assembly of the State of Maryland, and the laws of said State, originally under the name of the Guardian Security, Trust and Deposit Company, and performed and accepted all corpor-

hereinbefore stated, and other facts known to your orator, and said bondholders, snowing the danger of waste, injury and dissipation of the property composing said trust estate, your orator and said bondholders deem the immediate appointment of a receiver to hold and operate said property under the direction of the court in the premises necessary for the preservation and protection of said property, and to the full and proper exercise and execution of the rights and remedies accorded by said deed of trust. And, further, that upon consultation with the members of the board of directors of said defendant company, they have, just prior to the filing of this bill, acknowledged the existence of the causes for the immediate appointment of a receiver, and assented to such action and its necessity.

Seventh. Wherefore, in consideration of the premises, your orator prays your honors to pass an order, or orders, and decree of the court to the following purpose and effect.

(1) Appointing immediately a receiver of this court to take into his custody, possession and management, all the property, assets and rights of the defendant, the Greens-
(8) boro Water Supply Company, and to carry on the operation and business of said company under its franchises, and under the direction of this court, and to collect all the rents, profits and revenues of said company, and all moneys now due and to become due said company, and to sue in his name, as said receiver, in this court, or any court of the United States, or of any of the States having jurisdiction in the premises, for the possession or recovery of all property, money, assets, or any other thing belonging to said company, or to which said receiver may be entitled thereunder.

(2) Enjoining and prohibiting any and all persons and corporations whatever from interfering with said receiver so as aforesaid appointed by this court, either as to his possession of the property of such company, or the management thereof, and especially from suing said company, or, by any proceeding under the form of law, attempting to deprive said receiver of the possession or right to the possession of all the assets, rights, credits and moneys of said defendant company, except upon application to this court in this proceeding, which possession and rights and disputes relative thereto, this court is competent to determine, and will of right determine.

(3) Referring the papers and proceedings in this cause to a special master or auditor to be appointed by this court

to take an account, and to make a report to this court of all the property, assets, rights, and franchises of the defendant company, and the value thereof, and all the indebtedness of said defendant company, and the lawful lien and priority of the various classes of creditors, and whatever else such special master may be requested to report by the parties to this cause.

(4) Passing a final decree or order in the premises, selling, or otherwise disposing of the property and assets of said defendant company, so as to execute fully and fairly for the benefit of the holders of the bonds secured by the mortgage in these proceedings, the trusts declared therein (9) for their benefit, either according to the terms of said mortgage or according to the course and custom of this court, as may appear proper to this court.

(5) Granting such other and further and relief as may to this court seem fit and may to your orator's case seem necessary, in view of the facts and circumstances herein alleged and which may be made to appear at the final hearing of this cause.

And, further, to grant the writ of subpœna directed to the said defendant, the Greensboro Water Supply Company, to be served upon its president or other officer commanding said defendant on or before a day therein named, to appear and answer (an answer under oath being expressly waived) the matters and facts herein alleged against it, and show cause, if any there be, why a decree should not be passed as prayed.

And will ever pray.

THE GUARDIAN TRUST AND DEPOSIT CO.,
By JOHN L. BLAKE, President.

ARCHIBALD H. TAYLOR, Solicitor.

STATE OF MARYLAND, Baltimore City, } To-wit:

I hereby certify that before me, the undersigned, a notary public of the State of Maryland, duly commissioned and qualified to take affidavits in said city and State, personally appeared John L. Blake, President of the Guardian Trust and Deposit Co., and made oath in due form of law that the matters and facts set out in the foregoing bill of complaint, are true, where alleged of his own knowledge, and true according to the best of his information and belief, where alleged upon the information of others.

Given under my hand and notarial seal this 19 day of Sept., in the year nineteen hundred.

[Seal] ARTHUR W. ROBINSON, N. P.

Endorsed:

Filed in this office Sept. 29, 1900.

SAM'L L. TROGDON, Clerk.

ANSWER OF GREENSBORO WATER SUPPLY COMPANY.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(10) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.

To the Honorable the Judges of said court:

The answer of the above named defendant to the bill of complaint of said complainant, respectfully shows unto your Honors:

First. That said defendant admits the matters and facts alleged in the bill of complaint of said plaintiff to be true as therein set out, with the exception of the allegation as to the insolvency of the company, and submits itself to such decree as this court may see fit to pass in the premises.

Second. That this defendant assents to the immediate passage of an order of this court appointing a receiver for the property of the defendant company in these proceedings mentioned, and suggests the name of R. R. King, Esq., as a proper person under the circumstances to be appointed receiver.

Third. That this answer is filed by the authority and approval of the board of directors of said defendant company.

As witness the corporate seal of said defendant company duly affixed by its authority.

GREENSBORO WATER SUPPLY COMPANY,
[Seal] By JAS. D. GLENN, President.
WM. C. SEDDON, Secretary.
A. B. KIMBALL, Solicitor.

Endorsed:

Filed in this office Sept. 29, 1900.

SAM'L L. TROGDON, Clerk.

ORDER APPOINTING RECEIVER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(11) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.

Order of the Court Appointing Receiver.

Upon consideration of the foregoing bill of complaint of the Guardian Trust and Deposit Company, and the answer of the defendant, the Greensboro Water Supply Company, assenting to the immediate appointment of a receiver for the property in these proceedings mentioned, it is, this 29th day of September, 1900, by the Circuit Court of the United States for the Western District of North Carolina,

Ordered, adjudged and decreed that Robert R. King is hereby appointed receiver of the Greensboro Water Supply Company, its property, assets, rights and franchises, being the property in these proceedings mentioned, and the said receiver is hereby authorized and directed to take into his custody, possession and management all the property, assets and rights of the defendant, the Greensboro Water Supply Company, and to carry on the operations and business of said company under its franchises, contracts and privileges, and under the direction of this court, with power in the receiver to make such expenditures, and incur such indebtedness as may be necessary to exercise the greatest advantage the franchise granted to the company, and to comply with all the obligations resting upon it, and the indebtedness so incurred shall be a first lien upon all the revenue, income and assets which shall come into the receiver's hands, and to report all his proceedings, from time to time, to this court, and periodically at the expiration of each six months of his receivership. And the said re-
(12) ceiver is further authorized and directed to collect all the rents, profits and revenues of said company, and all moneys now due and to become due said company, and to sue in his own name as receiver in this court, or any court of the United States, or of any States having jurisdiction in the premises, for the possession or recovery of all prop-

erty, money, assets or any other thing belonging to said company, or to which said receiver may be or become entitled. And all persons and corporations whatever are further prohibited from interfering with said receiver, either as to the possession of the property of such company, or management thereof, or from suing said receiver in any court of law or under form of any proceeding at law, except upon application to this court, and obtaining permission to take such action.

Leave is hereby given to all parties in the case of Charlotte J. Gorrell *vs.* Greensboro Water Supply Company, to perfect the appeal in said case, and try the same in the Supreme Court.

And before entering upon the duties of said receivership, the said receiver shall qualify by giving bond, with security to be approved by the court, in the penalty of ten thousand dollars ($10,000.00), conditioned for the faithful performance of his duties under this order, and all future orders and decrees of this court in the premises.

JAS. E. BOYD,
U. S. Judge.

(Endorsed :)

Filed in this office Sept. 29, 1900.

SAM'L L. TROGDON, Clerk.

RECEIVER'S BOND.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(13) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainants,
vs.
The Greensboro Water Supply Company, Defendant.

This undertaking, made and entered into the 1st day of October, 1900, Witnesseth : that we, Robert R. King, as principal, and R. M. Rees and John W. Cook and J. H. Gilmer, as sureties, do promise and undertake, to and with the clerk of said court, for the benefit of whom it may concern, in the penal sum of ten thousand ($10,000) dollars that the said Robert R. King will faithfully discharge the duties of receiver of the Greensboro Water Supply Company, and obey all orders of the court herein.

Witness our hands and seals this 1st day of October, 1900.

R. R. KING, [Seal]
R. M. REES, [Seal]
JNO. W. COOK, [Seal]
J. H. GILMER, [Seal]

Approved:

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office October 3, 1900.

SAM'L L. TROGDON, Clerk.

REPORT OF RECEIVER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(14) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
Greensboro Water Supply Company, Defendant.

To the Honorable the Judge of said Court:

The Report of Robert R. King, the receiver of the property in these proceedings mentioned, respectfully shows unto your Honor:

1st. That your receiver files herewith a copy of a resolution passed by the Board of Alderman of the City of Greensboro, the 30th day of October, 1900, marked Exhibit "A," with this report, and a copy of the communication to said Board of Alderman by a committee purporting to represent the bondholders of the Greensboro Water Supply Company, marked Exhibit "B" with this report.

That, as appears from said two exhibits, the said committe of bondholders of the Greensboro Water Supply Company have agreed to recommend to the court a sale of all the property and franchises of the defendant company now under the jurisdiction of this court to the said City of Greensboro at and for the sum of seventy-five thousand dollars ($75,000.00), the purchase money to be paid by the said city immediately upon the conveyance of a perfect and indefeatible title for said property to the said city under the order and decree of this Honorable Court.

2nd. That your receiver deems it his duty to inform the court that he is informed and believes that the persons named as a committee of the bondholders of the Greensboro Water Supply Company have communicated with the holders of the bonds issued under said mortgage, being a large majority of all of said bonds issued, if not the whole of said issue, which bondholders have assented to the terms (15) of the said sale, and the bonds held by the them have been deposited or will be deposited with the Guardian Trust and Deposit Company, the trustee under said mortgage, to be filed in these proceedings as evidence of their assent to the terms of the sale above mentioned, and to receive their due and lawful dividend upon said bonds.

But, as already appears in these proceedings, the said bonds were issued by the said Greensboro Water Supply Company as a lien upon the property purchased by said defendant company or its assignors at a sale of the property and franchises of the Greensboro Water Company, which sale was made subject to the lien of the mortgage made by the said Greensboro Water Company to the Guaranty Trust and Safe Deposit Company to secure an issue of fifty thousand dollars ($50,000) of first mortgage bonds upon the property and franchises of said company, which bonds are all outstanding, and are in the hands of persons altogether unknown to your receiver, and unknown, as he is informed and believes, to the committee of the bondholders of the Greensboro Water Supply Company, with whom the said Mayor and Board of Aldermen have concluded the agreement herewith reported, subject to the order and direction of this Honorable Court.

That your receiver is further informed by the said committee of bondholders of the Greensboro Water Supply Company that they have used and are using their best efforts to locate and communicate with the holders of the bonds issued under mortgage of the Greensboro Water Supply Company to said Guaranty Trust and Safe Deposit Company, which are a first lien upon the property in these proceedings mentioned.

That said committee have informed your receiver that they cannot hope to locate all of the holders of the bonds of said last mentioned class, until the coupons are presented for payment at the date when the next maturing coupons fall due, to-wit: February 1st, 1901, when it is expected the said bondholders may be located and notified to produce and file their bonds, and receive their due and law-
(16) ful dividend thereupon.

That, in as much as the amount of the purchase money agreed upon will be sufficient to satisfy in full the princi-

pal and accrued interest of the said last mentioned class of bondholders, their assent to the terms of said sale may be presumed, and the assent of the subsequent bondholders, upon whom the sacrifice must fall, being obtained, the court is in a position to order the immediate conveyance and delivery of the property aforesaid, subject to the rights of the said first mortgage bondholders, and allowing the said purchaser to retain the amount of the said first mortgage of the Greensboro Water Company from the purchase money to be paid for the whole property; and, as aforementioned, the formal assent of the bondholders of the said Greensboro Water Supply Company by the deposit of their bonds in court, may be obtained, and the assent of the company on behalf of all its stockholders, who are present in court by counsel, will also be formally entered.

But that, unless this equitable adjustment of the terms of the proposed sale can be made, it will be necessary for the court to delay the sale until communication can be had with the bondholders of the Greensboro Water Company above mentioned, and their voluntary appearance in these proceedings, and the assent to the above terms of sale can be had.

Respectfully submitted,

R. R. KING, Receiver.

EX. A.

STATE OF NORTH CAROLINA, }
City of Greensboro. }

At a meeting of the Board of Aldermen of the City of Greensboro, held on the 30th day of October, 1900, the following resolution was offered by Alderman Joyner, was passed by the Board:

Resolved by the Board of Aldermen of the City of (17) Greensboro, N, C., that the following letter be addressed to the receiver of the Greensboro Water Supply Company, to-wit:

To Mr. R. R. King: Receiver of the Greensboro Water Supply Co.

Dear Sir,—Complying with the proposition of the committee of bondholders of the Greensboro Water Supply Company, the City of Greensboro hereby offers and agrees to pay for the system, plant, franchise and other property of the Greensboro Water Supply Company the sum of $75,000 upon the following conditions, to-wit:

(1) The city is to receive a perfect and indefeasible

title to all of said property, including the branch on Summit avenue, free from incumbrances, liabilities and liens of all kinds.

(2) The Water Company, or you, as receiver, are to receive the income and rents from said plants up to the date of transfer, and payment of the purchase price.

(3) All rights of the company under the alleged contract between it and the city are to cease on the date of transfer of said plant.

(4) The transfer is to be made, and the purchase price paid as soon as the city sells its bonds issued for the purpose of buying or building a water works plant, which bonds are to be advertised for sale at once.

(5) You are authorized to report this offer immediately to the court for its acceptance, and the Board hereby authorizes the City Clerk to deliver to you a copy of this offer, which is adopted by the Board of Aldermen, signed by its Mayor, and attested by its City Clerk, with the seal of the city attached.

By order of the Board of Aldermen, Nov. 9, 1900.

[Seal] Z. V. TAYLOR,
Mayor.

JOHN S. MICHAUX,
City Clerk.

EXHIBIT B.

Board of Aldermen,
(18) City of Greensboro, N. C.

The resolution of date October 16th, 1900, of your Honorable Board has been communicated to the undersigned, who are a committee representing the interests of the bondholders of the Greensboro Water Supply Company. This resolution, without withdrawing the offer contained in the previous resolution of your Honorable Board of date August 11th, 1900, offering $87,500.00 for the property of the Greensboro Water Supply Company, offered the sum of $75,000 for the same property. We desire to say respectfully to your Honorable Body that the first offer had been accepted by the bondholders of the company, but in as much as the offer of $87,500 was less than the total number of outstanding bonds of the company, which are $110,000 in amount, the property having cost over that amount of money to construct, it became necessary to put

the property in the hands of a receiver, so that all the bonds might be deposited with the court, and a perfect and complete title given to the property, and this was done in order to comply with the offer aforesaid.

Your committee were, therefore, prepared to recommend to the court the passage of a decree authorizing the receiver to convey the property upon the payment of the sum of $87,500, thus offered and accepted.

In as much as the second offer impliedly withdraws the first, and is made accompanied with the threat that your Board will build a system of water works for the city in the place of the present system, which was built under authority of ordinances passed by your Board, and upon faith of the hydrant rental guaranteed to our company at a period when it was acknowledged to be impossible for the city of Greensboro to construct a plant for itself, it now becomes necessary for the new offer to be submitted to the court in order to obtain its acceptance. This committee cannot make the offer for your Honorable Body to the court, (19) because, as in the case of the previous offer, it may be withdrawn before the court can act upon it, and the committee cannot assume the responsibility of speaking for your Honorable body. But if your Honorable body will address the offer in question to the court, through its receiver, and authorize him to report it immediately to the court for its acceptance, this committee will immediately recommend its acceptance, and the court can pass its decree directing that a conveyance shall be made to you for the property upon the payment of the purchase money offered, $75,000. This decree will, of course, be framed by the court in terms to the effect that, until the money is paid and the deed is made, the rights and liabilities of all parties shall be preserved and the rental, now payable by the city for the hydrants shall be apportioned and collected to the date of the purchase money paid and the conveyance made, and such arrears or proportion of rental and all dues from private persons and subscribers due to that date shall be paid and accounted for to the receiver, and shall not pass with the property.

This committee deems it due to your Honorable Board and to the bondholders, whom they represent, to state plainly that they believe the property for which this offer is made is worth over $110,000, the full amount of the bonded debt upon it, and that there is but one fair and righteous way of compelling the water company to part with its property, and of enabling the city to buy it, and that is to have its value determined by fair arbitration, as

ate acts under that name prior to the year 1898, but heretofore and since January 1st, 1898, its corporate name was changed by Act of Assembly of said State of Maryland, to the Guardian Trust and Deposit Company, and said complainant, your orator, is a citizen and resident of the State of Maryland, and the defendant herein named, the Greensboro Water Supply Company, is a body corporate, duly incorporated under the laws of the State of North Carolina, and is a citizen and resident of said last named State, having its principal office within said State and Judicial District, and that the subject matter, property and claim or thing in dispute in this suit is of value exceeding two thousand dollars, and within the jurisdiction of this Honorable Court.

Second. That heretofore, to-wit: July 1st, 1896, the said defendant, the Greensboro Water Supply Company, executed unto your orator, as trustee as therein set out, a mortgage or deed of trust of said date, and duly filed for (3) registration and recorded in the office of the Register of Deeds of Guilford county, North Carolina, in Book No. 102, page 764, etc. which mortgage is herewith filed and designated "Complainant's Exhibit No. 1," and is prayed to be taken as part of this bill; and that your orator, the complainant, as appears by said mortgage, in the course of the performance of the business and duties for which it was incorporated, accepted said trust by said deed conferred, and bound itself to carry out the trusts and duties thereby imposed.

Third. That said mortgage or deed of trust was executed to secure an issue of one hundred and ten bonds of the denomination of one thousand dollars each, Nos. 1 to 80, inclusive, being denominated Series A. bonds, and having a prior lien upon both the property, revenues and earnings of said defendant company, and Nos. 81 to 119, inclusive, being denominated Series B bonds, and having a lien upon said property and revenues next after Series A. bonds; that of said Series A bonds, fifty, being the Nos. 1 to 50, inclusive, were given by the terms of said deed to your orator to be held by it in trust to secure the payment, redemption or retirement, prior to maturity, of fifty bonds of the denomination of one thousand dollars each, issued under a mortgage or deed of trust of the Greensboro Water Company, a body corporate, dated, to-wit: January 10th, 1888, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford county, North Carolina, which mortgage or deed of trust, and the bonds secured thereby, are in full operation and effect and out-

standing, and, except subject to the operation of which mortgage, the defendant, the Greensboro Water Company, never received any title to the property in these proceedings mentioned, and subject to the operation of which mortgage it made its conveyance to your orator as herein set out. And the said fifty bonds, Nos. 1 to 50, inclusive, of Series A are now in the possession of your orator, and are held by it according to the terms of said deed of trust or mortgage, but have not otherwise been issued, nor have (4) they been sold or negotiated to any person whatsoever.

Fourth. That, therefore, the bonds which have been sold and negotiated and are issued and outstanding under the said mortgage consist of thirty bonds of Series A, Nos. 51 to 80, inclusive, each of the denomination of $1,000.00, and thirty bonds of Series B, each of the denomination of $1,000, and numbered 81 to 110, inclusive; and your orator has been requested by the holders and owners of the majority of each of said clases of bonds secured by said mortgage, to file this bill of complaint and invoke the action of this court herein prayed, in the premises.

Fifth. And your orator particularly avers and charges that defaults have occurred and taken place in the terms of said mortgage or deed of trust, which it was the object and intent of said mortgage to provide against and secure, and upon the happening of which, it is provided by said mortgage, that it should be the right and duty of your orator to re-enter upon and possess said property, or to sell the same with or without re-entry upon and possession of the same, and always to have a receiver appointed to take the same into his care, custody and management under the direction of a court having jurisdiction of the premises, until the said property mentioned in said mortgage should be sold in accordance with the terms of said mortgage or otherwise, under the direction of said court, as might be deemed advisable by said court for the protection of the interests of said bondholders and all others interested in said property, and that the defaults or breaches of the terms of said mortgage which have occurred, are all those mentioned in and provided against in clause five (5) of said mortgage, viz.:

(a) The semi-annual interest upon the outstanding bonds of Series A and Series B, falling due Aug. 1st, 1900, was not paid out of the moneys, funds and revenues of the said mortgagor, the defendant corporation, but from money borrowed to pay the same, which money is still due and

unpaid, and assets of the corporation upon which your or-
(5) ator has a lien as security for said bondholders were pledged to raise the money paid out on said coupons, which was a virtual breach and default under said mortgage, and has continued more than one month.

(b) The semi-annual interest falling due August 1st, 1900, upon the fifty thousand dollars of bonds known as the first mortgage bonds of the Greensboro Water Company, being a lien as aforesaid by the terms of the deed of trust made by said Greensboro Water Company prior to the acquisition of this property by the defendant, were not paid August 1st, 1900, out of moneys in the treasury of the defendant company, but out of the moneys borrowed by said defendant company as next above set out, thereby subjecting the property of the defendant company to a default under the terms of said prior mortgage, and thus depriving the holders of the bonds issued under the terms of the mortgage to your complainant of the security guaranteed to them under said mortgage.

(c) Lawful charges and taxes due and payable by said defendant company are now in arrears to a considerable amount, to-wit: to the amount of $1,000.00.

(d) A judgment lien of the amount of $5,000 upon a judgment obtained at the suit of one Gorrell in the Superior Court of Guilford county, was obtained, and execution issued therefor, and levied upon all the property and franchises of the defendant company, which execution was stayed and superseded upon the giving of a bond with security in the penalty of $6,000, but the surety, upon said supersedeas bond, the Fidelity and Deposit Company of Maryland, *is* now by law, and as a condition of joining in such bond, became substituted and subrogated to all the rights of said judgment creditor and in a position to enforce said judgment lien at any time, and as a consequence of such judgment and execution the Judge of the Superior Court of Guilford county appointed a receiver for all the property of the defendant company, which receiver was only discharged upon giving the bond as aforesaid, and
(6) may be reappointed by said court at any time upon the instance of the Fidelity and Deposit Company of Maryland, standing in the place of said judgment creditor, Gorrell.

(e) Besides the said claim of the said Gorrell reduced to judgment as aforesaid, said defendant company is harrassed and threatened with many other claims, amounting in the aggregate to $30,000, for alleged damages occurring

by fires, which said claimants allege it was the duty of said defendant company to prevent or extinguish under the terms of some alleged contract made with the city of Greensboro for their benefit, which claims, if reduced to judgment, said claimants allege to be prior to the lien of the bonds secured by the deed of trust or mortgage made to your orator, but wrongfully, as your orator is advised and charges, but, nevertheless, your orator is entitled, and so claims and charges, to have this court take jurisdiction of the property and assets of this company and determine the rightful lien and priorities, if any, of one creditor over another, and particularly to enforce the lien of the mortgage or deed of trust made to your orator for the benefit of the holders of the bonds secured thereby.

(f) And, particularly, that said defendant company is indebted to several and various persons and corporations in several sums of money for work done and materials and supplies furnished upon its order and for its benefit, over and above the mortgage indebtedness above referred to, the aggregate of the principal of which mortgage indebtedness is one hundred and ten thousand dollars, and there is no money in the treasury of the company to pay such floating indebtedness, nor the interest upon said mortgage bonds; and said defendant company is, in law and fact, insolvent, so that its assets should be taken into the care and custody of this court and operated by this court for the benefit of its several classes of creditors, and ultimately administered and distributed according to the lawful priorities of said creditors.

Sixth. And your orator particularly avers and charges that by the fifth clause of the mortgage or deed of trust, Ex-
(7) hibit No. 1, it is made the express duty of your orator, whenever it shall appear to such trustee or to the holders of the bonds secured thereby, proper and desirable for the protection of the interests and estate conveyed in trust, or for the more perfect effectuation of the trusts and purposes declared in said deed, to apply to a court of equity of any of the States, or of the United States, having general jurisdiction over the subject matter, to assume jurisdiction of the trust, and to order, decree and carry out the remedies in said mortgage proposed and accorded, as well as such other remedies as the court may deem needful and proper for the protection and benefit of the holders of the bonds secured in said mortgage, and that the assent of said defendant company is therein pledged and given finally in advance to the immediate appointment of a receiver by the court upon such application, and that, in view of the facts

PETITION OF THE GUARDIAN TRUST AND DEPOSIT CO. IN RE SALE TO CITY OF GREENSBORO.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(25) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Plaintiff,
vs.
Greensboro Water Supply Company et al., Defendant.

To the Honorable the Judge of said Court:

The petition of the Guardian Trust and Deposit Company of Baltimore City, the complainant in these proceedings mentioned, respectfully shows to the court:

That heretofore, to-wit: since the passage of the order of this court appointing Clement Manly, Esquire, the auditor and master of this court, to whom the papers in the cause were referred, to make a report thereupon, and especially to ascertain and report to this court all the liens upon the property in these proceedings mentioned, and the interest of any parties therein who may appear in accordance with the terms of said order, and the claims and demands of all persons whatsoever against said defendant company, who may duly prove the same, and the lawful order and priority of all such liens, against the funds in the hands of the receiver or to come into his hands, and against the proceeds of the sale of the property in these proceedings mentioned, or any part thereof, which may be ordered by this court, the said master and auditor hath gone on in the performance of said order or decree and the following proceedings have been taken and the following parties have appeared and filed proof of their liens and claims upon the property in these proceedings mentioned or the proceeds of the sale of the same made or to be made by this court, viz.:

First. Proof has been taken before said master of the ownership of all the bonds, both of Series A and Series B,
(26) issued under the mortgage or deed of trust made to your complainant in these proceedings by the Greensboro Water Supply Company, the defendant in these proceedings, and all of said bonds have been deposited with your complainant to be disposed of according to the order and direction of this court, and to receive their due proportion of the proceeds of the sale of the property prayed in these proceedings, according to their lawful order and priority,

as this court may ascertain and determine, with the exception of one single bond, No. of Series B, in such mortgage mentioned, which is in the possession of the Greensboro National Bank of Greensboro, N. C., having been pledged with them by its owner, James D. Glenn, the late president of the company, who has duly appeared before the master and given proof of the same.

Second. That proof has been taken before said master of the ownership of the bonds known as the first mortgage bonds of the Greensboro Water Company, being fifty in number of the denomination of one thousand dollars each, and the owners of said bonds or their committee or attordeys in fact have appeared in these proceedings before the master, and the large majority of them have deposited the said bonds with your complainant, under a written authority, to-wit: to receive and collect the principal of said bonds, with the interest accrued to date, without regard to the time of the maturity of said bonds, in fact and effect consenting to treat the said bonds as due and in default and to receive the amount lawfully due them, either from the city of Greensboro, the purchaser of the property in these proceedings mentioned, or from the officer of this court, and the balance of said bonds have been deposited with W. C. Seddon and Company, bankers, and one of the committee appointed to represent said bondholders in this cause, with the same instructions and to the same intent and effect, all of which will appear from the proceedings of said auditor and master heretofore taken in this court.

Third. That C. J. Gorrell, B. J. Fisher, Helen G. Brown, A. M. Scales, assignee of A. A. Hinkle, and A. A. (27) Hinkle, A. M. Scales, assignee of Hodgin, Pegram & Co., claiming to be judgment creditors of the said Greensboro Water Supply Company, for the amounts set out in their alleged records of such judgments, and the Southern Stock Mutual Insurance Company, claiming to be a creditor of the said Greensboro Water Supply Company upon an open and unliquidated account against the said Greensboro Water Supply Company, have appeared in these proceedings before the master and auditor, and offered proof of their said alleged claims, alleging the same to be liens against the property of the defendant company over which this court has taken jurisdiction for the purpose of ascertaining all liens and encumbrances and selling the same, and the said master is now engaged in adjudicating upon the claims of the said persons intervening, but has not yet made his final report thereon.

Fourth. That the said master has taken proof of all current claims, debts and accounts due by the said defendant company and of all claims or debts whatsoever, so far as the same can be ascertained by an examination of the officers of the said company and of its books and papers, and that he hath strictly, in accordance with the terms of the order of court appointing him, given notice by publication of the terms of said order requiring all persons who may have any interest in the property in these proceedings mentioned, or any claim or demand against the same, or against the defendant company in these proceedings mentioned, to appear in these proceedings, and make due proof of the same, and on failure so to make proof, any and all persons will be excluded from any interest and right in the premises or participation in the distribution of the assets in these proceedings.

That it therefore appears that all persons having any interest in the property in these proceedings and any claim or demand against the said defendant company or against its said property or against the proceeds of sale of said property, when ordered by the court, have either voluntarily appeared in these proceedings and made proof of their claims and become parties to the proceedings or that (28) all such persons have been duly warned and notified to appear according to the course and custom of this court, which has full and complete jurisdiction over the said subject matter of said proceeding, and the said defendant company and its property, and that in fact the record makes it plain to the court that all persons whatsoever having any right in or claim claim to said property, or against the proceeds of sale thereof, have intervened in these proceedings and have become parties hereto.

That the receiver of the court in these proceedings mentioned heretofore, by his report to the court filed in these proceedings, reported to the court the offer to purchsse the property of the defendant company in these proceedings made by the Board of Aldermen of the City of Greensboro in its behalf, by resolution passed the thirtieth day of October, 1900, and served upon said receiver by further order of said Board of Alderman, November 19th, 1900. That, as appears by said resolution of the Board of Aldermen of said city, and is further proved by the testimony and proceedings taken before the master, the said sale of the property of the said defendant water company to the said city of Greensboro for the sum of $75,000 had been agreed upon by committees representing all classes of bondholders of said company, and by the officers of said company representing the stockholders thereof, prior to the

passage of the said resolution, and the various alleged creditors and intervenors who have appeared before said master, have all appeared with the knowledge of the agreement of the said city of Greensboro, and the other parties to these proceedings to said sale, and with the intent and for the purpose of receiving their proper and lawful dividend out of the proceeds of the said sale, so that, in fact, the said city of Greensboro, and all parties and persons whatsoever interested in these proceedings have assented to said sale, and become bound to carry out the terms thereof.

That, further, the said City of Greensboro is desirous of obtaining immediate possession of the said property in (29) these proceedings mentioned, which supplies the said city with water, both for public and private uses, in order that the same may be under its complete management and control, and that improvements and additions necessary for the public uses of the said city may be made, and that the public interests of said city will suffer if the immediate delivery of said property into the hands of the city be not completed, and the Board of Aldermen of said city have notified the said receiver to this effect. That said City of Greensboro, the purchaser aforesaid, is, of course, further interested to be assured that with the delivery of said property, and the deed for the same under the order and direction of this court, "that a perfect and *indeasible* title to said property, including the branch on Summit avenue, free from incumbrance, liabilities and liens of all kinds," shall be made to it. That it appears, that with all possible persons and parties who have any interest or claim whatsoever in said property, having duly appeared and becomes parties to these proceedings, as above set out, and that the due and customary course of proceedings has been followed by this court, which has full and complete jurisdiction over thep roperty, to warn and bring in all persons and parties so entitled, and that all such parties, in effect, have consented to the terms of said sale, such title has been necessarily assured to said purchaser, the City of Greensboro. But, further, your petitioner suggests to the court that if, in addition to ordering said receiver to deliver the said property to the said purchaser, the City of Greensboro, with a proper and sufficient conveyance in accordance with the terms of said sale, the said court shall further order the said receiver to receive the said purchase money, and to retain the same under the jurisdiction of this court, and subject to its direction until the final adjudication and determination of the claims of all persons, parties hereto or intervening in these proceedings, and all persons whatsoever having a claim

against the said property, or against the proceeds of sale (30) thereof, is completely secured to said purchasers. And, further, it is competent for the court to enjoin and prohibit all the said parties, and all persons whatsoever from interfering with the possession and title of the said purchaser, the City of Greensboro, and to require any and all persons claiming any right, interest or demand whatsoever against the said property, so sold to the City of Greensboro, to appear in this court, on and before a period therein named, and present their claim against the proceeds of sale of said property, in the place of said property, and to order and direct said receiver to take any action that may be necessary and advisable to protect the title so as aforesaid, conveyed by him to the said purchaser, the said City of Greensboro, and to be allowed the expense of maintaining and taking such action out of the funds in his hands as receiver.

Wherefore your petitioner prays your Honor to pass such order and decree to the end aforesaid, or such other order and decree in the premises, as may to the court seem fit and proper.

And will ever pray.

THE GUARDIAN TRUST AND DEPOSIT COMPANY OF BALTIMORE CITY,
By ARCHIBALD H. TAYLOR, Attorney.

Endorsed:

Filed in this office July 18, 1901.

SAM'L L. TROGDON, Clerk.

REPORT OF RECEIVER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE (31) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
Greensboro Water Supply Company, Defendant.

To the Honorable the Judge of said Court:

The report of Robert R. King, the receiver in these proceedings mentioned, respectfully shows unto your Honor:

That, heretofore, since his previous report filed in these proceedings, in which he reported to this court, by authority of the Board of Aldermen of the City of Greens-

boro, the contract for the purchase of the property in these proceedings mentioned, heretofore made by the City of Greensboro with the Greensboro Water Supply Company, and its bondholders, for the action of this court thereupon, the proceedings in the said cause were referred to Clement Manly, the master and auditor of this court, to ascertain and report to the court all the liens, encumbrances, claims and demands of all persons whatsoever against the said Greensboro Water Supply Company, and its property now in the possession of your receiver.

That while said auditor and master has not yet made his final report to the court, your receiver believes that all parties to these proceedings, and all parties having any claim, right, title or interest in said property, have duly appeared before said master and submitted their said claims, so as to have the same adjudicated and allowed in their lawful order and priority against the said property or the proceeds of the sale thereof under the direction of the court.

That, in the meantime, the said City of Greensboro is (32) waiting to take possession of the said property in order to take the same under its management, and make such additions and improvements thereto as the public needs may require, and have served a notice upon your receiver to complete said sale in accordance with the terms terms thereof, and deliver the said property with a proper and sufficient deed for the same, as appears by a copy of the report of Aldermen Sergeant, the Chairman of the Water and Light Commission of the said Board, together with resolution of said Board passed upon motion of Alderman Joyner, which has been delivered to your receiver by order of the said Board of Aldermen herewith filed. That your receiver has always been ready, and is now ready, to carry out the terms of the said contract of sale with the said City of Greensboro heretofore reported to this court, with his approval, and is satisfied that the proceedings in this cause are now so far matured that every person and party entitled to any interest whatsoever in the said property is now before the court, and as appears by the petition of the complainant in these proceedings filed immediately heretofore, has, either expressly or by implication of law, assented to the confirmation of the report of sale heretofore filed in these proceedings, and asked to be allowed to participate in the dividends to be ascertained and allowed by the court out of the fund, the proceeds of said sale.

And your receiver further suggests to the court that due proceedings have been had and taken by the said mas-

ter of this court, in accordance with the order of this court, and its course and custom, to notify all parties having any interest whatsoever in the said property, or the proceeds of sale thereof, to appear and make proof of their said claims before the said auditor and master, or otherwise to be forever barred and deprived of such claim, and that the time for making such claim in accordance with the terms of such notice has expired. But your receiver further suggests to the court that, if he shall be authorized by the court to deliver the said property to the said purchaser, the (33) City of Greensboro, with a proper and sufficient deed of conveyance of the same in accordance with the terms of the said contract of purchase, and to receive the said purchase money, and then to retain the same under the direction of this court and within its jurisdiction until the final adjudication of the claims of all the parties thereto having any interest in or claim to the said property or the proceeds of sale thereof, and until a further date to be set by this court for the appearance of any and all such persons to file and make such claim or otherwise to be barred of any and all claim whatsoever, then and in such case a perfect title and protection in the possession of the property so sold to the city of Greensboro is assured to said purchaser. And, further, your receiver suggests to the court that this court hath already enjoined and prohibited any and all persons whatsoever from interfering with the possession of said property, or the title thereto, in the hands of the said receiver, and such prohibition and injunction can and ought to be extended to the said purchaser of said property of said receiver at the hands of the court, and that any and all persons having any such claim shall present them in this court and against the said fund, the proceeds of said sale, and not against the property aforesaid so sold and conveyed. And, further, it is proper that your receiver should be authorized to take any action to protect the title so as aforesaid conveyed and assured by him to the said purchaser, the City of Greensboro, at the expense of the said receivership.

And, further, your receiver suggests that the said bondholders be required to deposit all their bonds with the receiver or clerk of the court to await the determination and adjudication of their rights thereupon and their lawful order and priority and to receive their lawful dividends upon the same and to have such dividends stamped thereon and to be cancelled upon such payment.

That under these circumstances a perfect and indefeasible title to all of said property, free from encumbrances, liabilities and lien of all kinds, whatsoever, is cer-

(34) tainly assured to the said city of Greensboro, the said purchaser, in accordance with the terms of said contract.

Wherefore your said receiver recommends to the court the passage of an order or decree of this court directing the sale and conveyance of the said property in his possession to the said City of Greensboro, in accordance with the terms hereof, and to the same general intent and effect as the terms set out and suggested in the petition of the said complainant immediately heretofore filed in these proceedings.

R. R. KING, Receiver.

To the Board of Aldermen of the City of Greensboro, N. C.:

Gentlemen,—As you are well aware, the city contracted to buy the property of the Greensboro Water Supply Company for the sum of seventy-five thousand dollars ($75,000.00) upon certain conditions appearing in the minutes of the Board and among the conditions was the following: that the said company should give the city a good and indefeasible, clear of incumbrances, and should indemnify the city against any suits or judgments and that it was also agreed that possession of said property should be given on the 1st of January, 1901.

The city has now waited more than five months for said transaction to be completed and it now appears no nearer a settlement than at the time of contracting.

Our attorney informs us that the said company is not in a position to give us a clear title to said property because of about $40,000.00 of judgment liens on the property, and the litigation seems not to be near an end.

We did not agree to buy any law suits and we cannot close the transaction unless we are fully protected, and we (35) certainly would not be protected, if we bought under the present circumstances.

We think that the city cannot afford to wait any longer in this matter, and we recommend that you instruct the city attorney to inform the receiver of said company that the contract must be carried out at once or at a very early day.

If the contract is not complied with after such notice, we recommend that the city proceed at once to build its own water works plant.

Alderman Joyner moved that the city attorney be instructed to inform the receiver of the water works company that the contract made with the city for the purchase of the water works plant must be carried out at once, or

at a very early date, and that he be directed also to furnish said receiver with a full copy of the recommendations, etc.

Passed June 24th, 1901.

Endorsed:

Filed in this office July 18, 1901.

SAM'L L. TROGDON, Clerk.

DECREE CONFIRMING SALE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(36) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
Greensboro Water Supply Co., Defendant.

This cause coming on to be heard upon the bill of complaint, answer of the Greensboro Water Supply Company, and the report of the receiver, Robert R. King, filed in these proceedings, the 31st day of December, 1900, and the petition of the complainant, the Guardian Trust and Deposit Company, and the report of said receiver filed in these proceedings the 18th day of July, 1901, and the several resolutions of the Board of Aldermen of the City of Greensboro, copies of which are filed with the said reports of the receiver, and all the other papers and proceedings in said cause being duly read and considered.

It is this 18th day of July, 1901, by the court ordered, decreed and adjudged that the said sale of the property in the hands of the receiver, in these proceedings mentioned, to the said City of Greensboro, at and for the sum of $75,000 cash, according to the agreement made by the said City of Greensboro and reported to the court by the said receiver, and recommended for acceptance, in his said reports, be, and the same is, hereby accepted and confirmed and ratified by the court, and the said receiver is hereby ordered to make a conveyance of said property known as the water works belonging to the said defendant, the Greensboro Water Supply Company, namely, the land, buildings, reservoirs, mains, engines, stands, pumping plant, pipes, furniture, tools, fixtures and all rights, privileges and franchises heretofore granted and belonging to the Greensboro Water Company and to its assignee, the Greensboro Water Supply Company, being all the prop-
(37) erty, real, personal and mixed, of the said Greensboro Water Company and the Greensboro Water Supply

Company, saving and excepting the cash in hand or in bank collected by and belonging to said receiver, and the accounts payable to said receiver or to said company, unto the said purchaser, the City of Greensboro, upon receiving at the same time the said purchase price for the said property of $75,000, together with the proportionate instalment of water rent due by the said city for water furnished to it for hydrants and otherwise, calculated up to the date of the delivery of said deed and the receipt of said purchase money, which said purchase money is hereby ordered to be paid by the said City of Greensboro to said receiver. And said deed shall set out that said conveyance is made free and clear of all liens and incumbrances and claims and demands of any and all persons and parties whatsoever, in, to or upon said property thereby conveyed. And at the same time the said receiver shall deliver possession of the said property so as aforesaid sold and ordered to be conveyed to the said purchasers, the City of Greensboro, strictly in accordance with the terms of said deed. And the said receiver is hereby directed and ordered to retain the said purchase money so as aforesaid ordered to be paid to him, in his hands, subject to the further order and direction of this court, and pending the determination by this court of the claims of all parties whatsoever having any claim in or right to or lien or incumbrance upon the property so as aforesaid sold and ordered to be conveyed, or to the proceeds of sale thereof. And meanwhile said receiver shall deposit said money at interest upon the best terms obtainable by him in such lawful depositories as may be designated and approved by this court.

And, further, all the said parties to this cause and all persons who have intervened or appeared herein on account of any interest claimed in the premises, and all persons whatsoever claiming any right, title or interest in, or lien upon the property hereby sold and ordered to be conveyed are (38) forever prohibited and enjoined from interfering with the possession, title, enjoyment, management and control of the said property by the said purchaser, the City of Greensboro, to whom the same is ordered to be conveyed, by any act or proceedings whatsoever, in any court of any jurisdiction, or in any manner whatsoever, but all such persons and all persons having or claiming any right, title or interest in, or demand or lien upon the said property hereby sold and ordered to be conveyed, or the proceeds of sale thereof, are hereby ordered and required to file such claim or demand, if not already filed or claimed in these proceedings, by petition in these proceedings for the consideration and

is expressly provided in the contract, in case the city of Greensboro should desire to purchase the property.

The security holders of the Greensboro Water Supply Company only yield to the compulsion of acception the terms offered, because of the consideration that if the city should attempt to go on and build its own water works contrary to the terms of its contract, set out in the ordinances referred to, the result would be to impair the value of this company's property, but at the same time to sub-
(20) ject the city to ruinous and needless expense, and produce an endless contest between the two systems of water works.

In accepting the offer, therefore, the bondholders desire to state that they consider the price named by the city as altogether unfair and inadequate and that they act only under compulsion.

Signed: WILLIAM C. SEDDON,
WILLIAM H. BOSLEY,
JOHN S. GITTINGS,
ARCHIBALD H. TAYLOR,
Bondholders Committee.

Endorsed:

Filed in this office Dec. 31, 1900.

SAM'L L. TROGDON, Clerk.

PETITION FOR ORDER OF REFERENCE AND ORDER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(21) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
The Greensboro Water Supply Company, Defendant,

The petition of the Guardian Trust and Deposit Company, the plaintiff in these proceedings mentioned, respectfully shows unto your Honor:

1st. That in accordance with the prayer of the bill in these proceedings mentioned and for the due maturity of the proceedings it is necessary and proper for the court to appoint an auditor or master in the nature of a referee, who shall give notice in accordance with law and the practice of the court to all parties having an interest in these proceedings and claims and demands of any sort whatsoever

against the defendant company in these proceedings mentioned to file said claims and demands with said auditor and master and make due proof of the same.

Wherefore, your petitioner prays your Honor to pass an order of the court appointing such auditor and master and directing him to make a report of all the liens upon the property in these proceedings mentioned, and the interest of any parties therein who may appear in accordance with the terms of said order, and the claims and demands of all persons whatsoever against said defendant company who may duly prove the same, and the lawful order and priority of all such liens, claims and demands against the funds in the hands of your receiver or to come into his hands, and against the proceeds of the sale of the property in these proceedings mentioned or any part thereof which may be ordered by the court. And will ever pray.

ARCHIBALD H. TAYLOR,
for Petitioner.

(22) Upon the foregoing petition of the Guardian Trust and Deposit Company of Baltimore, the plaintiff in these proceedings mentioned, it is hereby ordered and decreed this the 31st day of December, 1900, by the Circuit Court of the United States for the Western District of North Carolina, that Clement Manly, Esq., be, and he is hereby, appointed special auditor and master of this court in these proceedings, to whom the papers in this cause are hereby referred to make a report thereon, in accordance with the prayer of said petition, and especially ascertain and report to this court all the liens upon the property in these proceedings mentioned, and the interest of any parties therein who may appear in accordance with the terms of said order, and the claims and demands of all persons whatsoever against said defendant company who may duly prove the same, and the lawful order and priority of all such claims against the funds in the hands of the receiver or to come into his hands, and against the proceeds of the sale of the property in these proceedings mentioned, or any part thereof which may be ordered by the court; and said auditor and master is hereby ordered to give notice, by publication once a week for four weeks in the Greensboro Daily Record of the terms or this order, and requiring all persons who may have any interest in the property in these proceedings mentioned, or any claim and demand against the same, or against the defendant company in these proceedings mentioned, to appear in these proceedings, and

make due proof of the same, and that he will, on a date named in said notice, receive such proof of such claims and demands as may be exhibited before him; and on failure so to make proof, any and all persons will be excluded from any interest and right in the premises or participation in the distribution of the assets in these proceedings.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office Dec. 31, 1902.

SAM'L L. TROGDON, Clerk.

PETITION OF RECEIVERS AND ORDER TO PAY COUPONS UPON FIRST MORTGAGE BONDS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(23) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Co.
vs.
The Greensboro Water Supply Company.

To the Honorable the Judge of said Court:

The petition of R. R. King, the receiver appointed by the court in these proceedings, respectfully shows unto your Honor:

1st. That your receiver now has in his hands the sum of, to-wit: more than $4,000.00, including city warrants, the proceeds of collections of rent, tolls, revenue and income of the property for which he is receiver, and subject to all charges for operation and maintenance of the property and expenses properly chargeable against said fund. There is more than sufficient to meet the coupons aggregating $1,500.00 in amount on the first mortgage bonds of the Greensboro Water Company, maturing Feb'y 1st, 1901.

2nd. That said coupons, according to the best advice and information of your petitioner, are a just lien upon the net fund over and above the expenses chargeable against it as aforesaid, in as much as said mortgage was a first lien upon all the rents, revenues and property of the Greensboro Water Company by the bonds of the mortgage to the Guardian Trust & Safe Deposit Co., of Phila., dated day of , 1888, and said property was purchased by, and conveyed to, defendant, the Greensboro Water Supply Company, subject to such lien in all respects,

and consequently all prior claims or actions against said defendant company, whether arising by mortgage or upon any other engagement or act of said company, can only affect property of said defendant company, which was all received subject to said mortgage.

3rd. That the counsel for the complainant and defendant have not only consented in behalf of their clients in advance to the prayer of this petition, but the committee (24) representing the first mortgage bondholders of the defendant company, who are endeavoring to carry out the sale assented to by them of the property of said company to the City of Greensboro, have represented particularly to your petitioner that by the payment of said coupons they will be enabled to get into communication with the holders of said first mortgage bonds and induce them to surrender their bonds and file them in court, and receive the principal of the same, thus accomplishing the completion of said sale.

Wherefore your petitioner prays your Honor to pass an order of this court authorizing and directing him to pay said coupons. And will ever pray.

R. R. KING, Receiver.

ORDER OF COURT THEREON.

Upon consideration of the foregoing petition of R. R. King, receiver, it is this 24th day of January, 1901, ordered by the Circuit Court of the United States for the Western District of North Carolina that the prayer of said petitioner be granted as prayed, and said receiver is hereby authorized and directed to pay the coupons upon the first mortgage bonds of the Greensboro Water Company maturing February 1, 1901, out of the net revenues and income of the property in his hands as receiver.

JAS. E. BOYD,
U. S. Judge.

We assent to the passage of this order.

A. H. TAYLOR,
By M.
Solicitor for complainant.
A. B. KIMBALL,
Solicitor for defendant.

Endorsed:

Filed in this office Jan'y 24, 1901.

SAM'L L. TROGDON, Clerk.

and ratified by the court, and the said receiver is hereby ordered to make a conveyance of said property known as the water works belonging to the said defendant, the Greensboro Water Supply Company, namely, the land, buildings, reservoirs, mains, engines, stands, pumping plant, pipes, furniture, tools, fixtures and all rights, privileges and franchises heretofore granted and belonging to the Greensboro Water Company and to its assignee, the Greensboro Water Supply Company, being all the property, real, personal and mixed, of the said Greensboro Water Company and the Greensboro Water Supply Company, saving and excepting the cash in hand or in bank collected by and belonging to said receiver, and the accounts payable to said receiver or to said company, unto the said purchaser, the City of Greensboro, upon receiving at the same time the said purchase price for the said property, $75,000, together with the proportionate instalment of water rents due by the said city for water furnished to it for hydrants and otherwise, calculated up to the date of the delivery of said deed and the receipt of said purchase money, which said purchase money is hereby ordered to be paid by the said City of Greensboro to said receiver. And said deed shall set out that said conveyance is made free and clear of all liens and incumbrances and claims and demands of any and all persons and parties whatsoever, in, to or upon said property thereby conveyed. And at the same time the said receiver shall deliver possession of the said property so as aforesaid sold and ordered to be conveyed to the (45) said purchasers, the City of Greensboro, strictly in accordance with the terms of said deed. And the said receiver is hereby directed and ordered to retain the said purchase money so as aforesaid ordered to be paid to him, in his hands, subject to the further order and direction of this court, and pending the determination by this court of the claims of all parties whatsoever having any claim in or a right to or a lien or incumbrance upon the property so as aforesaid sold and ordered to be conveyed, or to the proceeds of sale thereof. And meanwhile said receiver shall deposit said money at interest upon the best terms obtainable by him in such lawful depositories as may be designated and approved by the court.

And, further, all the said parties to this cause and all persons who have intervened or appeared herein on account of any interest claimed in the premises, and all persons whatsoever claiming any right, title or interest in, or lien upon the property hereby sold and ordered to be conveyed are forever prohibited and enjoined from interfering with

the possession, title, enjoyment, management and control of the said property by the said purchaser, the City of Greensboro, to whom the same is ordered to be conveyed, by any act or proceedings whatsoever, in any court of any jurisdiction, or in any manner whatsoever, but all such persons and all persons having or claiming any right, title or interest in, or demand or lien upon the said property hereby sold and ordered to be conveyed, or the proceeds of sale thereof, are hereby ordered and required to file such claim or demand, if not already filed or claimed in these proceedings, by petition in these proceedings for the consideration and action of the court thereon, within sixty days of the date hereof, or to be forever barred of all such right, claim or demand, and the receiver of this court is hereby ordered to give notice to this effect, by publication once a week for four weeks in the Greensboro Daily Record, of the terms of this order, and that copies of this order be served personally on Helen G. Brown, A. M. Scales, assignee, A. A. Hinkle, B. J. Fisher and the Southern Stock Mutual Insurance Company of Greensboro, N. C.

(46) And the said receiver is further authorized and ordered to take any action or steps that may be necessary or advisable to assure the title to the property hereby ordered to be conveyed to the said purchaser, and to charge the expenses of such action to the receivership estate.

And the bondholders or owners of the first mortgage bonds of the Greensboro Water Company and the Guardian Trust and Deposit Company, the depository, and the bondholders and owners of the first mortgage bonds, both Series A & B, of the Greensboro Water Supply Company, are hereby ordered to deposit their said bonds with the receiver in these proceedings mentioned, and to take his receipt for such deposit, in order that the dividend, if any, due and allowable to the said owners of said bonds upon the said bonds may be ascertained and allowed, and, when paid to the said bondholders, may be stamped upon said bonds and the said bonds be cancelled upon such payment.

And this cause is continued for further proceedings.

JAS. E. BOYD,
U. S. Judge.

A true copy,

Test: SAM'L L. TROGDON, Clerk.

Endorsed:

Filed in this office July 27, 1901.

SAM'L L. TROGDON, Clerk.

ORDER TO CITY OF GREENSBORO ET AL. TO SHOW CAUSE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(47) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company,
Complainant,
versus
Greensboro Water Supply Company,
Defendant.

This cause coming on for further orders and directions upon the report of the receiver filed on the 27th instant, wherein instructions are prayed for, and the previous reports and orders in this cause made, it is now, on motion, ordered, adjudged and decreed by the court that the city of Greensboro, B. J. Fisher, Helen G. Brown, the Southern Stock Mutual Insurance Company, A. A. Hinkle and A. M. Scales, assignee of A. A. Hinkle, and as assignee of Hodgin, Pegram & Co., show cause, if any they or either of them have, before the undersigned, at Chambers, in the United States Government Building, in Greensboro, North Carolina, at eleven o'clock, A. M., on August 5th, next, the same being the first Monday thereof, why the city of Greensboro shall not comply with its proposition to purchase what is known as the Greensboro Water Works Property in these proceedings mentioned, and why all other parties to these proceedings shall not carry out and perform the provisions and directions of the said order of the 18th inst., and especially why the said city shall not take a deed for the said property, and pay over the purchase price proposed and accepted by the court, to-wit: seventy-five thousand dollars ($75,000.00).

It is ordered and adjudged that a copy of this order be served upon the city of Greensboro, B. J. Fisher, or either of his attorneys of record, to-wit: John N. Staples, Esq., and A. L. Brooks, Esq , and upon Helen G. Brown, or either of her counsel of record, to-wit: John N. Wilson,
(48) Esq., and L. M. Scott, Esq., and upon A. M. Scales, Esq., as assignee of Hodgin, Pegram & Co., and of A. A. Hinkle, and upon A. A. Hinkle, or his counsel of record, A. M. Scales, Esq., and upon the Southern Stock Mutual Insurance Company, or its counsel or record, John N. Wilson, Esq.

At Chambers, in Greensboro, N. C., on this 29th day of July, 1901.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office July 29, 1901.

SAM'L L. TROGDON, Clerk.

REPORT OF RECEIVER AND ORDER IN RE REPAIRS OF PLANT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(49) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company, Complainant,
versus
Greensboro Water Supply Company, Defendant.

To the Honorable the Circuit Court of the United States in and for the District above named:

The undersigned, as the receiver of the Greensboro Water Works property, so appointed in these proceedings, would respectfully show unto the court:

That it has been suggested that by reason of the recent heavy rains, freshets and overflows, the water being furnished to the city of Greensboro and its inhabitants has become contaminated, and that, in consequence thereof there needs to be done considerable work by way of cleaning out and repairing the reservoirs and otherwise, tending to remove all objection and make wholesome the water so furnished.

Wherefore your receiver would ask that an order be passed by this Honorable Court directing said work to be done.

Respectfully submitted,

R. R. KING, Receiver.

Upon reading and considering the foregoing report and application, it is ordered, adjudged and decreed by the court that R. R. King, as receiver, be, and he is hereby, ordered and directed to do such work as to him shall seem necessary with a view of correcting the evils referred to, if such exist, and to pay for the same out of any moneys in his hands, as such receiver. At Chambers, in Greensboro, N. C., this July 29, 1901.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office July 29, 1901.

SAM'L L. TROGDON, Clerk.

ANSWER TO RULE BY CITY OF GREENSBORO.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(50) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO.

Guardian Trust & Deposit Company,
vs.
Greensboro Water Supply Company.

The city of Greensboro, in response to the rule served on it, in this cause, to show cause why it should not pay its offer of $75,000.00 for the property of the defendant, the Greensboro Water Supply Company, and receive a deed for the same, says:

That its offer to purchase contained stipulations and conditions that title to the property should be indefeasible, unincumbered, free from liens and liabilities, a perfect title, and should include what is called Summit avenue branch, and it is advised that, in the present status of the defendant, and the litigations in which it is involved, no conveyance insuring such title can be made, for, among other reasons, the existence of the following facts, to-wit:

The title of the defendant company is not perfect, for that it is encumbered by a debt of fifty thousand dollars ($50,000), principal money, evidenced by a number of outstanding bonds secured by a mortgage upon the property, executed by the Greensboro Water Company, through which it claims and derives title.

The property to be conveyed to respondent included the water mains on Summit avenue, one of the streets of the city, the title to which is in one Ceasar Cone, and has not been acquired by the defendant company.

That several actions in tort have been instituted in the Superior Court of Guilford county, a court having full and complete jurisdiction of the defendant and said property, in several of which actions the plaintiffs therein have obtained judgments in their favor, and presumably the plaintiffs in the remaining actions will recover judgment as their causes of actions are
(51) similar to those in which judgments have been obtained. In addition to these actions the defendant company is also indebted to others for labor and materials, and by the statute of North Carolina, enacted long before the

execution of the mortgages or trusts executed by the Greensboro Water Company aforesaid and by the defendant company to the complainant, neither the property nor earnings of the defendant company is exempt from executions for the satisfaction of judgments obtained against the defendant company for labor performed nor for torts committed by it, its agents or employees. That no decree made in the cause can protect this respondent, and the property of defendant, if acquired by purchase by it, from sale by the holders of the bonds of the Greensboro Water Company, nor from execution issued on judgments for torts committed by the defendant company, now or hereafter obtained, nor from executions issued on judgments for labor performed for defendant.

This respondent is advised that there is still due said bondholders the amount of fifty thousand dollars, $50,000.00, and interest to said tort sufferers about forty thousand dollars, $40,000.00, and to laborers about $———, exceeding by more than fifteen thousand dollars ($15,000), the bid of the respondent for defendant's property, to say nothing of the amount of the proceeds of sale expended in costs and other expenses of this litigation.

This respondent has been ready and able to comply with its proposition to purchase since the 1st of last January, and has been anxious to consummate the purchase, and has already suffered loss by the outlay as it sold its interest bearing bonds to procure this money, several months since, expecting to receive, and it having been agreed that it should receive, title as soon as sale of its bonds was effected.

That, owing to the conditions of the property, which needs improvements and enlargement to supply water of sufficient purity and amount to the inhabitants of the city, (52) the transfer of the property should have been made before now, and it was understood by and between the defendant, the receiver and the respondent that time was of the essence of the proposition to purchase, as the respondent was preparing to construct other works and make other arrangements for a supply of water.

JAMES T. MOREHEAD,
Solicitor for the City of Greensboro.

Endorsed:

Filed in this office August 6, 1901.

SAM'L L. TROGDON, Clerk.

ORDER MAKING GUARANTEE TRUST & SAFE DEPOSIT COMPANY A PARTY TO THIS ACTION.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NO. (53) CA. CIRCUIT COURT, 4TH CIRCUIT, AT GREENSBORO.

The Guardian Trust and Deposit Company of Baltimore, Maryland,
vs.
The Greensboro Water Supply Co.

No. 151.
In Equity.

In this cause, it appearing to the court that the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee in a mortgage executed by the Greensboro Water Company, on the 10th day of January, 1888, to secure an original issue of bonds to the amount of fifty thousand dollars, is a necessary party to this suit, and it having been this day ordered that complainant amend his bill and make said Guarantee Trust and Safe Deposit Company a party defendant in this action; and it further appearing that the said Guarantee Trust and Safe Deposit Company is not an inhabitant of nor found within this district, but resides in Philadelphia, in the State of Pennsylvania, and does not voluntarily appear as a party to this suit.

It is ordered that the said Guarantee Trust and Safe Deposit Company of Philadelphia, trustee as aforesaid, appear in this court on the first Monday in September next, and then and there plead, answer or demur to the complainant's bill. It is further ordered that this order be served on the said Guarantee Trust and Safe Deposit Company by the United States Marshal for the Eastern District of Pennsylvania, by delivering to the president or other proper officer of the company duly certified copies of this order, of complainant's bill, and of the writ of subpœna to be issued by the clerk of this court in this cause. August 7th, 1901.

CHAS. H. SIMONTON,
U. S. Circuit Judge,
JAS. E. BOYD,
U. S. District Judge,
Presiding.

Endorsed:

Filed in this office Aug. 7, 1901.

SAM'L L. TROGDON, Clerk.

MARSHAL'S RETURN ON SAID ORDER.

(54) Aug. 9th, 1901, at Philadelphia, in my district, served the within order of court, together with the order of court of August 7th, 1901, continuing hearing to first Monday of September, 1901, the bill of complaint and the amended bill in this cause upon the Guarantee Trust and Safe Deposit Company of Philadelphia, by giving true and attested copies of each to Richard C. Winthrope, trust officer of said company. So answered.

JNO. B. ROBINSON,
U. S. Marshal.
Per JOS. H. HUDDELL,
Deputy.

ORDER CONTINUING HEARING TO FIRST MONDAY IN SEPTEMBER, 1901.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NO.
(55) CA. CIRCUIT COURT, 4TH CIRCUIT, AT GREENSBORO.

The Guardian Trust and Deposit Company of Baltimore, Maryland,
vs.
The Greensboro Water Supply Co.
No. 151. In Equity.

This cause coming on to be heard this day upon the rule to show cause and the returns thereto, and it appearing to the court upon the hearing the return of the city of Greensboro that the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee in a mortgage executed by the Greensboro Water Company, on the 10th day of Jan'y, 1888, to secure an original issue of bonds to the amount of fifty thousand dollars, is a necessary party to this suit;

It is ordered that the further hearing of this cause be continued until the first Monday in September next, and that, in the meantime, the bill be amended by making the said Guarantee Trust and Safe Deposit Company a party to these proceedings, and the clerk will forthwith issue process against the said company.
August 7th, 1901.

CHARLES H. SIMONTON,
U. S. Circuit Judge,
JAS. E. BOYD,
U. S. District Judge,
Presiding

Endorsed:

Filed in this office Aug. 7, 1901.

SAM'L L. TROGDON, Clerk.

CLAIM OF CÆSAR CONE.

In the Circuit Court of the United States for the
(56) Western District of North Carolina.

Guardian Trust & Deposit Company, Complainant,
vs.
Greensboro Water Supply Company, Defendant.

Pursuant to notice given by Clement Manly, Esq., special master, so appointed in this cause, I appeared before him at the hearing at the office of Mess. King & Kimball, and through Jas. D. Glenn, Esq., president of the defendant water company, proved my contract with the defendant company for laying the water pipe on Summit avenue and, with the consent of all present at the hearing, I filed a copy of the same for the guidance of the receiver. Under the contract the title to the pipe laid under Summit avenue was to remain in me till I should be paid therefor by the Water Company, it being understood that the company was to take it off of my hands and pay me the original cost per contract. That I then, as I understood, and do now submit my claim to the action of this Honorable Court, praying that I may be paid in accordance with said contract, after which I shall be ready to make title as the court may direct,

Respectfully submitted,

CÆSAR CONE.

Endorsed:

Filed in this office Aug. 7, 1901.

SAM'L L. TROGDON, Clerk.

AMENDED BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(57) WESTERN DISTRICT OF NORTH CAROLINA.
IN EQUITY. No. 151.

The Guardian Trust and Deposit Company of Maryland, Complainant,
vs.
The Greensboro Water Supply Company & Guarantee Trust and Safe Deposit Co. of Philadelphia, Pa., Defendants.

The complainant, the Guardian Trust and Deposit Company, above named, by way of amendment to the original bill in this proceeding filed, by leave and order of the court first had and made, would respectfully show, aver and state unto your Honors:

First. That what is known and mentioned in the original bill in these proceedings as the Greensboro Water Company was a corporation created, organized, existing and doing business in and, under the laws of the State of North Carolina, and, as such, was a citizen and resident of said State, being chartered or created on the — day of ————, 1887.

Second. That thereafter, to-wit: on the 10th day of January, 1888, the said Greensboro Water Company made, executed and delivered a certain mortgage or deed of trust to the Guarantee Trust and Safe Deposit Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and therein doing business, and as such was at that time and ever since has been and still is a citizen and resident of the State of Pennsylvania, whereby all the property of every nature and description, including franchises and privileges and property, as well then owned by the said Greensboro Water Company as any thereafter to be acquired, were conveyed to the said Guarantee Trust and Safe Deposit Company, as trustee, to secure an issue of bonds amounting in the aggregate to fifty thousand dollars ($50,000), each bond being for the sum of
(58) one thousand dollars ($1,000) and numbered from one (1) to fifty (50), inclusive, which mortgage or deed of trust was regularly filed and recorded in Book No. 73, at pages 653 *et seq.*, in the office of the Register of Deeds for Guilford county, said county being the same wherein the property therein described was located, a copy of which deed or mortgage has heretofore been filed in these pro-

action of the court thereon, within sixty days of the date hereof, or to be forever barred of all such right, claim or demand, and the receiver of this court is hereby ordered to give notice to this effect, by publication once a week for four weeks in the Greensboro Daily Record, of the terms of this order, and that copies of this order be served personally on Helen G. Brown, A. M. Scales, assignee, A. A. Hinkle, B. J. Fisher and the Southern Stock Mutual Insurance Company of Greensboro, N. C.

And said receiver is further authorized and ordered to take any action or steps that may be necessary or advisable to assure the title to the property hereby ordered to be conveyed to the said purchaser, and to charge the expenses of such action to the receivership estate.

And the bondholders or owners of the first mortgage bonds of the Greensboro Water Company and the Guardian Trust and Deposit Company, the depository, and the bondholders and owners of the first mortgage bonds, both Series A & B, of the Greensboro Water Supply Company, are hereby ordered to deposit their said bonds with the receiver in these proceedings mentioned, and to take his receipt for such deposit, in order that the dividend, if any, due and allowable to the said owners of said bonds upon the said bonds may be ascertained and allowed, and, when paid to the said bondholders, may be stamped upon said (39) bonds and the said bonds be cancelled upon such payment.

And this cause is continued for further proceedings.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office July 18, 1901.

SAM'L L. TROGDON, Clerk.

REPORT OF RECEIVER IN RE SALE TO CITY.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(40) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
Greensboro Water Supply Company, Defendant.

To the Honorable the Circuit Court of the United States:

The undersigned, as the receiver of the property of

the Greensboro Water Supply Company in the above entitled action, would respectfully report unto the court:

1. That in pursuance of an order in the above case made by his Honor Jas. E. Boyd, United States Judge, on the 18th of July, 1901, he, as receiver, addressed a letter or notice to the Hon. W. H. Osborne, as the Mayor of the City of Greensboro, a copy of which is hereto attached.

2. That on March 11th, 1901, the charter of the City of Greensboro was amended, and among other things therein provided for is a "Water and Light Commission" composed of three men, and that, in pursuance of this authority conferred upon the Board of Alderman of Greensboro, they elected Messrs. W. T. Sergeant, B. H. Merriman and Jas. D. Glenn as commissioners, of which commission or board W. T. Sergeant is chairman.

3. That in view of the existence of this "Water and Light Commission" and of the fact that Mr. Sergeant was chairman thereof, your receiver addressed him a letter as such chairman, a copy of which is hereto attached.

4. Your receiver is advised that, in consequence of the order hereinbefore referred to and these letters or notices, the Board of Aldermen of the City of Greensboro on the 22nd inst. held a meeting for the consideration of the question of taking title to the property and paying over the money pursuant to the order hereinbefore referred to, and (41) that at such meeting the Board of Aldermen committed the whole matter to the "Water and Light Commission" hereinbefore referred to.

5 That, as a result thereof and of the action of the said Water and Light Commission, Mr. A. M. Scales, attorney for said commissioners, in pursuance of authority given him, handed your receiver on this, the 27th day of July, 1901, a resolution purporting to have been passed by said Water and Light Commission, a copy of which is hereto attached and made a part of this report.

In view of the action taken by the city by its Board of Aldermen and the Water and Light Commission, as hereinbefore set out, your receiver would respectfully ask the instructions of this Honorable Court as to his duties in in this behalf.

Respectfully submitted,

R. R. KING, Receiver.

This 27th July, 1901.

Greensboro, N. C., July 19, 1901.

Hon. W. H. Osborn,
Mayor of City of Greensboro,
City:

Dear Sir,—The undersigned is glad to be able to say to you and your Honorable Board of Aldermen for the City of Greensboro that Hon. Jas. E. Boyd, Judge of the U. S. Court, on yesterday made an order in the case of the Guardian Trust and Deposit Company *vs.* Greensboro Water Supply Company, pending in the Circuit Court of the United States for the Western District of North Carolina, confirming the sale of what is known as the Greensboro Water Works property to the city of Greensboro for the consideration of $75,000.00. A copy of this order may be seen on application to S. L. Trogdon, clerk of said court.

I am ready at any time to make the deed when the (42) city shall have complied with the said order.

Hoping the matter can and will be closed at once, I am,

Yours truly,

R. R. KING, Receiver.

Greensboro, N. C., July 19th, 1901.

Mr. W. T. Sergeant,
Chmn. Board Water & Light Commission
of City of Greensboro, City.

Dear Sir,—I have the pleasure of announcing to you that on yesterday Hon. Jas. E. Boyd, Judge of the District Court at this place, made an order in the case of the Guardian Trust and Deposit Company of Maryland *vs.* Greensboro Water Supply Company, pending in the Circuit Court of the United States for the Western District of North Carolina, confirming the sale of the property known as the Greensboro Water Works to the City of Greensboro, and directing me as receiver of the property to make to the city a title for the same free and clear from all incumbrances upon receipt of the purchase price, to-wit: $75,000, and the payment to me, as receiver, of any and all sums due by the city on account of rents up to the time of transfer. I am now ready to make the deed in accordance with this order at any time.

Hoping that the money can be paid at once and the deed and possession delivered in accordance with said order, I am,

Yours truly,

R. R. KING, Receiver.

Resolved by the Water and Light Commission of the City of Greensboro that

Whereas Mr. R. R. King, receiver of the Greensboro (43) Water Supply Company and the committee of bondholders have failed to comply with their contract with the city of Greensboro in that they have failed to turn over the water works system to the city at the time agreed upon and refuse to indemnify the city against judgments and suits as agreed, and now refuse to give the city a clear and indefeasible title to said property free of all incumbrances, liabilities and liens as agreed, but offer the city a title to the said property with judgment liens docketed against the property and other suits pending against the said property, and, whereas, the said commission is advised by its counsel and is of the opinion that the said receiver and committee have not complied with the said agreement,

Therefore, the commission declines to accept the title offered and hereby instructs the city attorney to notify Mr. King of this action by sending him a copy of this resolution.

Copy.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
Greensboro Water Supply Co., Defendant.

This cause coming on to be heard upon the bill of complaint, answer of the Greensboro Water Supply Company, and the report of the receiver, Robert R. King, filed in these proceedings, the 31st day of December, 1900, and the petition of the complainant, the Guardian Trust and Deposit Company, and the report of said receiver filed in these proceedings the 18th day of July, 1901, and the several resolutions of the Board of Aldermen of the City of Greensboro, copies of which are filed with the said reports of the receiver, and all the other papers and proceedings (44) in said cause being duly read and considered.

It is this 18th day of July, 1901, by the court ordered, decreed and adjudged that the said sale of the property in the hands of the receiver, in these proceedings mentioned, to the said City of Greensboro, at and for the sum of $75,000 cash, according to the agreement made by the said City of Greensboro and reported to the court by the said receiver, and recommended for acceptance, in his said reports, be, and the same is, hereby accepted and confirmed

REPORT OF MASTER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(63) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO.

Guardian Trust & Deposit Company, Complainant,	In Equity.
vs.	
The Greensboro Water Supply Company, Defendant,	Number 151.

Report of Master.

To the Honorable the Judges of the Circuit Court of the United States, at Greensboro, North Carolina.

The undersigned Standing Master in Chancery respectfully makes to the court the following report:

This is a proceeding in equity, as above entitled, pending at Greensboro, North Carolina, instituted by complainant, by a bill filed and subpœna duly issued on the 29th day of September, 1900. On the 31st day of December, 1900, his Honor Judge Boyd made an order in the cause referring certain matters therein to the undersigned, as will appear by said order filed on the same day, and, in accordance with the provisions of said order, the undersigned Standing Master gave notice, by publication, to all persons concerned as directed in said order. The cause came up for hearing before the master on the 8th day of April, 1901, at 12 o'clock, noon, in the office of the Clerk of the United States Circuit Court, at Greensboro, North Carolina.

Present: R. R. King, receiver of the court, A. B. Kimball, of counsel for the defendant, Levi M. Scott and John N. Wilson, counsel for Helen G. Brown, creditor, A. M. Scales, plaintiff in the case of A. M. Scales, assignee of A. A. Hinkle *vs.* Greensboro Water Supply Company, and A. M. Scales, assignee of Hodgin, Pegram & Co. *vs.* Greensboro Water Supply Company, also A. M. Scales, of
(64) counsel for Southern Stock Mutual Life Insurance Company.

Later, in the course of taking testimony, W. P. Bynum and Taylor and Keith, of counsel for complainant, and John N. Staples, representing B. J. Fisher, creditor of the Greensboro Water Supply Company, and also A. L. Brooks, Esq., representing B. J. Fisher and other creditors, were present at various hearings, as appears in the record proper. Hearings were had at the times and places pursuant to the last adjournment, and testimony taken, as appears

fully in the record. From the testimony and exhibits, all of which have been duly filed and marked, the undersigned finds the following facts:

Finding of Facts.

I.

R. R. King, receiver appointed in this cause, duly filed with the master, his report of all moneys which have come into his hands, and all disbursements made, showing a balance due in his hands as receiver of $4,080.61, to which report is attached the following:

"Itemized statement of expenses from October 1st to January 1st, 1901, for labor, fuel account, miscellaneous.

Itemized expenses since January 1st, labor, fuel account, miscellaneous.

Arrears water rent due to December 31st, 1901.

Arrears from Jan'y 1st to April 1st, 1901.

List of accounts and claims owing by the defendant company at and before the receivership."

There was no exception filed by any creditor to said report, which is filed herein, marked Exhibit "A," and the master finds the accounts to be correct.

II.

That there is an account attached to the report of the receiver entitled "List of accounts and claims owing by the defendant company at and before the receivership."

These amounts aggregate the sum of three hundred and thirty-four and 49-100 dollars, and are bills incurred (65) for supplies and labor, and vouchers for same are filed and marked Exhibit "L." I find that such labor and material were necessary in running the business of the Greensboro Water Supply Company and keeping it a going concern. That two items of said account, to-wit: for professional services to Mess. King & Kimball and Bynum & Bynum are not for such services as were necessary in keeping the business of defendant company a going concern.

That a part of the pipes used by the Greensboro Water Supply Company on Summit avenue were laid pursuant to a contract between the company and Ceasar Cone, of date June 2nd, 1898, under which contract the pipes were laid under the direction of the company and paid for by Ceasar Cone, and the title thereof to remain in Mr. Cone until reimbursed for advances made by him. That said Cone should be reimbursed for his outlay by the payment to him of the rents collected from other citizens along said main

for the use of the water, and that upon the payment to him in full of his money advanced the said pipes shall then belong to the said Greensboro Water Supply Company. That there is now due to Ceasar Coné the sum of fifty-eight dollars under the contract aforesaid, and a payment of the same is required to vest in the company in fee the pipes laid under the contract aforesaid, and to enable it to make title thereto, in case of sale. All of which will appear by the contract filed and marked Exhibit "N."

III.

That the Greensboro Water Company is a corporation duly chartered and organized under the laws of North Carolina, and doing business as a water company in the City of Greensboro, North Carolina. That the said Greensboro Water Company did, on the 10th day of January, 1888, authorize and duly issue fifty thousand dollars par value of first mortgage six per cent. bonds of the denomination of one thousand dollars each, payable thirty years from February 1st, 1888, with coupons attached, payable semi-annually on the first days of February and August of each year, (66) upto, and including the first day of February, 1918, and, as a security for the said issue of the said bonds, did, on the 10th day of January, 1888, duly make and execute a deed of trust, duly probated and registered, to the Guarantee Trust & Safe Deposit Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, wherein the said Greensboro Water Company conveyed to the said Trust Company, as trustee, all of its franchises, privileges, rights and properties of every kind, unto the said trustee for the securing of the said issue of bonds. That the said bonds were duly certified and sold unto *bona fide* purchasers for value and are now outstanding in the hands of various persons, the principal thereof, and all interest due by coupons attached from February 1st, 1901, being unpaid. That the deed of trust securing said bond issue is duly filed herein, and marked complainant's Exhibit "C."

IV.

That in 1896 a proceeding was instituted in the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, entitled John A. Middendorf el al. *vs.* The Greensboro Water Company et al., asking for the appointment of a receiver, and for a sale of all of the properties of the Greensboro Water Company. That in said proceedings R. R. King and A. H. Taylor were duly appointed commissioners, and said commissioners sold

all of the rights, franchises, privileges and properties of every kind of the Greensboro Water Company unto Hugh L. Pope, all of which acts of the said commissioners *was* duly approved by his Honor Robert P. Dick, Judge, on the 2nd day of February, 1897. That said sale was subject to the trust deed heretofore mentioned to the Guardian Trust & Safe Deposit Company, marked Exhibit "C," and of the rights of the bondholders secured by said deed of trust. A transcript of the orders in the said cause of Middendorf et al. *vs.* Greensboro Water Company et al. is filed herein marked Complainant's Exhibit "D." That (67) pursuant to the orders made in the aforesaid cause, the said R. R. King and A. H. Taylor, commissioners, did, on the 30th day of April, 1896, execute a deed, duly probated and registered, to the said Hugh L. Pope, conveying to the said Pope all of the rights, properties, franchises and privileges of the Greensboro Water Company, subject to the provisions of the trust deed, Exhibit "C" as aforesaid, a copy of which said deed is filed herein marked Exhibit "F." That the said Hugh L. Pope, did, on the 30th day of April, 1896, convey to the Greensboro Water Supply Company, the defendant in this cause, a corporation duly chartered and organized under the laws of the State of North Carolina, all of the aforesaid properties subject to the provisions of the trust deed, Exhibit "C" aforesaid, a copy of which said deed to the Greensboro Water Supply Company is filed herein, and marked Complainant's Exhibit "F."

That the said Greensboro Water Supply Company did, on the first day of July, 1896, duly make and issue its mortgage bonds, with coupons attached, known as the first consolidated mortgage bonds of said company, to the amount of one hundred and ten thousand dollars, of the denomination of one thousand dollars each, bearing date of July 1st, 1896, and payable fifty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of July and January of each year. That eighty of said bonds, bearing numbers from one to eighty, inclusive, are known as Series A, and are, by the terms of the deed of trust, entitled to a lien upon the mortgaged properties, franchises, privileges, earnings and income of the said Greensboro Water Supply Company prior to all other liens, and prior to the bonds numbered from eighty-one to one hundred and ten, inclusive, which last mentioned numbers are known as Series B of said bonds, and by the terms of the deed of trust entitled to the lien of the mortgage succeeding the lien of the bonds series A. That to secure the said bonds, known as

the first mortgage consolidated bonds aforesaid, the Greensboro Water Supply Company did, on the first day of July, (68) 1896, duly authorize and execute a deed of trust, duly probated and registered, upon all of the rights, franchaises, properties, earnings and incomes to the Guardian Security, Trust & Deposit Company of Baltimore City, as trustee, a copy of which is filed herein, and marked Complainant's Exhibit "G."

VI.

That pursuant to the provisions of the trust deed, Complainant's Exhibit "G," aforesaid, the said Guardian Security, Trust & Deposit Company, trustee, duly certified said bonds, and held in its possession fifty thousand dollars thereof, to-wit: bonds of series A, from one to fifty, both inclusive, for the purpose of paying and satisfying the fifty thousand dollars of bonds of the Greensboro Water Company, heretofore mentioned in the second finding of fact, when the same should mature, or could be otherwise paid and retired. Which said issue of fifty thousand dollars of bonds of the Greensboro Water Company, secured by a deed of trust to the Guarantee Trust & Safe Deposit Company, were an existing lien upon all of the property conveyed by Hugh L. Pope to the Greensboro Water Supply Company, by deed marked Complainant's Exhibit "F." That of the said bonds, known as the first mortgage consolidated bonds, the residue thereof of series A, numbered from 51 to 80, inclusive, were disposed of as follows: twenty of the said bonds of the par value of twenty thousand dollars were duly certified by the trustee and sold by the Greensboro Water Supply Company to *bona fide* purchasers for value and are now outstanding; that ten of the said bonds of the value of ten thousand dollars were duly certified by the trustee and deposited by the Greensboro Water Supply Company as collateral security to its obligation, and now held as collateral by the Guardian Trust & Deposit Company, complainant, as will hereafter be explained in finding of fact No. IX. That the remaining issue of the said bonds, from 81 to 110, inclusive, known as series B, were duly certified by the trustee and sold by the Greensboro Water Supply Company (69) to *bona fide* purchasers for value, and the same are now outstanding; that thirty of said bonds of series A, numbered from 51 to 80, inclusive, and thirty of said bonds of series B, numbered from 81 to 110, inclusive, are now outstanding and unpaid, with all coupons due thereon from July 1st, 1900, as above set forth.

VII.

That the Guardian Security, Trust & Deposit Company, trustee in the trust deed marked Exhibit "G," is the identical company as the Guardian Trust & Deposit Company, the complainant, its name having been changed under the laws of the State of Maryland since the execution of the deed of July 1st, 1896, aforsaid. That for the purpose of a sale of the properties of the Greensboro Water Supply Company under the order of this court and a conveyance of the same made to the purchaser, free from any lien or incumbrance of any kind, and in compliance with orders heretofore made, a committee acting for the bondholders of the Greensboro Water Supply Company has collected and deposited with the complainant bonds as follows: thirty-eight of the bonds of the Greensboro Water Company aforesaid, which is the entire issue of bonds less twelve; also thirty of the bonds of the Greensboro Water Supply Company of series A, from 51 to 80, inclusive, and twenty-nine of series B bonds, being the entire issue of series B from 81 to 110, less one, which bond is numbered 92, and unaccounted for. That for said bonds the said Guardian Trust & Deposit Company issued a receipt to the owners or depositors thereof showing that the trust company held said bonds to be cancelled and surrendered on the payment of said bonds, according to their respective interest, the proceeds of the sale of the properties of the Greensboro Water Supply Company under the orders of this court; that the forms of which receipts is filed and marked Complainant's Exhibit "H. C. M." Nos. 1 and 3. That ten six per cent. bonds of the Greensboro Water Company are in the hands of W. C. Seddon, banker, of Baltimore, who claims to hold same subject to same condi-
(70) tions as those held by the complainant, which leaves two of said bonds unaccounted for.

VIII.

That after the purchase of the properties, rights, franchises and privileges by the Greensboro Water Supply Company from Hugh L. Pope by deed of the 30th of April, 1896, the said Greensboro Water Supply Company took possession of the same, and, under its own franchises and chartered rights, exercised the privileges of a water company, supplying water to the City of Greensboro and to the citizens of said city and its vicinity, and doing the usual business of a water supply company in the said City of Greensboro, North Carolina. That, in the course of its business as a water company, it entered into a contract

with the City of Greensboro for a supply of wrter to said said city, a copy of which is filed and marked Complainant's Exhibit "B," and under said contract furnished water to the City of Greensboro, up to the appointment of a receiver of the properties of the Greensboro Water Supply Company by this court, on the 29th day of September, 1900.

IX.

That at a special term, February, 1900, of the Superior Court of Guilford County, Charlotte J. Gorrell recovered judgment against the Greensboro Water Supply Company for five thousand dollars; that a copy of the judgment roll is hereto filed marked Complainant's Exhibit "H," which judgment roll contains the complaint and answer, and shows the nature of the action, and upon what cause of action the said judgment was obtained. That the said judgment was purchased by the Guardian Trust & Deposit Company from Charlotte J. Gorrell for thirty-five hundred dollars, and the same duly assigned to the Guardian Trust & Deposit Company, a copy of which assignment is duly filed and marked Complainant's Exhibit "K" That the said judgment is held by the said Guardian Trust & Deposit Company as follows: That A. H. Taylor, J. S. Gittings, W. C. Seddon and Wm. A. Bosley, on behalf of the Greensboro Water Supply Company, pur-
(71) chased said judgment through its agent, the Guardian Trust & Deposit Company, and hold said judgment at the convenience of the Greensboro Water Supply Company, the company giving them ten bonds of Series A as security against any loss which they might sustain. That said parties above named borrowed the said money from the Guardian Trust & Deposit Company, had the judgment conveyed to it, and deposited the said ten bonds with it as additional security, and the said Guardian Trust & Deposit Company so holds said judgment; the said ten bonds, Series A, are to be held by the Guardian Trust & Deposit Company as a security for the thirty-five hundred dollars advanced by it for the purchase of the said Gorrell judgment.

X.

The following claims upon the Greensboro Water Supply Company were also filed with the master, to-wit:

(1) Helen G. Brown judgment recovered at special term, January, 1901, for three thousand dollars. Copy of judgment roll was filed herein and marked Exhibit "No. 1."

(2) A. M. Scales, assignee of A. A. Hinkle, recovered at special term Superior Court of Guilford County, January, 1901, for thirty-two hundred and fifty dollars. Copy of claim, with judgment attached thereto, filed herein marked Exhibit "No. 2."

(3) A. M. Scales, assignee of Hodgin, Pegram & Co., by judgment recovered at the said special term, January, 1901, of the Superior Court of Guilford County, for eighteen hundred dollars, a copy of which claim, with judgment attached thereto, filed herein marked Exhibit "No. 3."

(4) Claim of Southern Stock Mutual Insurance Company for five thousand dollars; the said insurance company having insured the property of Helen G. Brown and of Charlotte J. Gorrell each for twenty-five hundred dollars against loss by fire, and, on the destruction of the property, having paid the said sum of twenty-five hundred dollars, respectively, to the said persons, said insurance company claims to be subrogated to the rights of the said Helen G. (72) Brown and Charlotte J. Gorrell, as appears by their claims filed in this cause against the Greensboro Water Supply Company, all of which cause of action is fully set out in the claim marked Exhibit "No. 4."

(5) B. J. Fisher, by judgment, recovered at the special term of the Superior Court of Guilford county, January, 1901, twenty-five thousand dollars, a copy of which claim, with judgment attached, is filed herein marked Exhibit "No. 5."

XI.

That while the said Greensboro Water Supply Company was in the course of business supplying water to the City of Greensboro under the contract marked Complainant's Exhibit "B," a fire occurred, destroying the property of several of the citizens of Greensboro, including the property of Charlotte J. Gorrell, Helen G. Brown, A. A. Hinkle, Hodgin, Pegram & Company and B. J. Fisher, claimants above mentioned, and the cause of *the* action of the several claimants upon which the several judgments were recovered, as set out in finding number 8, was that the said Greensboro Water Supply Company failed to supply water sufficient to extinguish said fires, and, through their failure to furnish said water under the contract aforesaid, marked Exhibit "B," claimants properties, respectively, were destroyed.

That the case of Charlotte J. Gorrell was tried on demurrer, appealed to Supreme Court, heard in the Supreme

Court, tried on its merits and final judgment rendered before the receiver was appointed in this cause. That the other claims upon which judgments were rendered were instituted a year prior to the appointment of the receivership aforesaid, and were pending in the Superior Court of Guilford county, but no pleadings were filed therein until after the appointment of the receiver aforesaid.

XII.

The undersigned standing master respectfully makes report to the court of the above finding of facts on matters as have to this time come before him, and transmits with (73) this report the evidence taken and all exhibits filed.

That he respectfully awaits the further orders or directions of the court in the premises.

Winston, N. C., August 15, 1901.

CLEMENT MANLY,
Standing Master in C.

Endorsed:

Filed in this office August 15, 1901.

SAM'L L. TROGDON, Clerk.

EVIDENCE TAKEN AT GREENSBORO.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(74) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO, N. C.

Guardian Trust and Deposit Company, Complainant, *vs.* Greensboro Water Supply Company, Defendant.	In Equity. Number 151.

Pursuant to notice duly published in the Daily Record, a newspaper published in Greensboro, N. C., according to the direction of court in the cause, which notice is as follows:

"**Notice.**

"UNITED STATES OF AMERICA, WESTERN DISTRICT OF N. C., IN THE CIRCUIT COURT OF THE UNITED STATES.

"Guardian Trust and Deposit Company, Complainant,
versus
"The Greensboro Water Supply Company, Defendant.

"To all claimers and creditors of the Greensboro Water Supply Company:

"You are hereby notified that the undersigned will, at the office of the Clerk of the United States Court, at Greensboro, North Carolina, on Monday, the 8th day of April, 1901, at 12 o'clock, noon, hear all matters of reference in the above entitled cause concerning the defendant company, its property and the funds in the hands of the receiver of the court appointed in said cause; all persons who have any interest in the property aforesaid, or any claim or demand against the same or against the defendant company in these proceedings, are hereby notified to appear at the time and place aforesaid and make due proof of the same, and of all liens against said property of the defendant, and of the lawful order and priority of any (75) such liens against the property and funds aforesaid.

"That the undersigned will, at the date and place named, receive any and all proof of such claims and demands as may be exhibited before him, and on failure to make proof, claim and demand as herein notified, any and all persons will be excluded from any interest and right in the premises, or participation in the distribution of the assets in these proceedings.

"This notice is given by virtue of a decree of his Honor, Jas. E. Boyd, judge, made in the Circuit Court of the United States, in the above entitled cause on December 31st, 1900, to which reference is given.

"Winston, N. C., March 9th, 1901.

"CLEMENT MANLY,
Special Master and Auditor."

The hearing on said notice was had at the office of the Clerk of the United States Court, at Greensboro, N. C., on Monday, April 8, 1901, at noon. Present: R. R. King, receiver of the court; A. B. Kimball, of counsel for the defendant; Levi M. Scott and John N. Wilson, of counsel for Helen G. Brown, creditor; A. M. Scales, plaintiff in

ceedings, and is prayed to be taken as a part of this amended bill.

Third. That, in pursuance of and as provided in said mortgage or deed of trust, the fifty (50) bonds therein mentioned and referred to were issued and sold and the same are now outstanding as subsisting obligations and are secured by the said mortgage or deed of trust which is first lien upon the property in these proceedings mentioned as the property of the Greensboro Water Supply Company, and, further, that the said Guarantee Trust and Safe Deposit Company accepted the trust as in said mortgage or deed of trust provided, whereby it became fully invested with the title to all of the property in these proceedings mentioned as a security by way of first lien to secure said indebtedness.

Fourth. That thereafter, to-wit: in the year 189–, the said Greensboro Water Company became involved and overwhelmed by additional indebtedness which rendered it insolvent and unable to meet its maturing obligations other than the interest on the bonds hereinbefore referred to, in consequence of which, at the instance of J. W. Middendorf and others in a proceeding in this Honorable Court against said Greensboro Water Company, a receiver was appointed of said property, in the course of which proceeding the said property, including the franchises, rights, etc., of the said Greensboro Water Company, were sold, subject to the lien of the mortgage or deed of trust hereinbefore referred to, to one, Hugh L. Pope, who purchased for himself and others, and who created and organized the defendant in these proceedings mentioned, the Greensboro Water Supply Company, which took over the property purchased as aforesaid, subject to the lien created by the deed of trust (59) of the Greensboro Water Company to the Guardian Trust and Safe Deposit Company; that said Greensboro Water Supply Company continued to operate said water works property as by its charter authorized up to the appointment of a receiver in this cause.

Fifth. That since the pendency of this action the City of Greensboro made a proposition and offer to purchase the property known as the Greensboro Water Works, in these proceedings named and described, to the receiver appointed by this court in this cause at and for the sum of seventy-five thousand dollars (75,000), in accordance with terms in the proposition of the said city made to the receiver of the property in this proceeding, which said proposition in writ-

ing has been heretofore filed by said receiver accompanied by and as a part of one of his reports.

Sixth. That thereafter, to-wit: on the 18th day of July, 1901, an order was passed in this proceeding accepting, confirming and ratifying said offer and sale to the said City of Greensboro in accordance with its proposition theretofore made and filed, notice of which was given to the said city, which, on notice to it to show cause why it should not comply with its said proposition by paying the said seventy-five thousand dollars ($75,000) and taking over the property, represented to this Honorable Court that by reason of the fact that, among other things, the Guarantee Trust and Safe Deposit Company, the trustee in the mortgage or deed in trust hereinbefore mentioned, was not a party to this proceeding, a good and perfect title could not be made, whereupon it was ordered that process be issued to make said Guarantee Trust and Safe Deposit Company a party to this proceeding by the issuance and service of the proper process, in order that the title proposed to be given and made to the City of Greensboro, in compliance with its bid, should be a free and perfect one, clear of all claims on the part of all persons whomsoever.

Seventh. That default has been made in the payment of the interest on said fifty thousand dollars ($50,000) of (60) first mortgage bonds which matured on the 1st day of August, 1901.

Eighth. That some of the holders and the agents and representatives of other holders holding forty-nine (49) of said first mortgage bonds have heretofore made proof of the same in these proceedings, and with a view and purpose of asserting their rights and receiving such dividend or dividends out of the proceeds of the sale of the property in these proceedings mentioned as shall be directed by this Honorable Court in the due administration of the fund received from the sale of said property and otherwise.

Ninth. That in the interest of all parties holding any claims against, interest in or lien upon said water works property, that the sale to the said City of Greensboro at and for the sum of seventy-five thousand dollars ($75,000) shall be carried out and perfected and that the proceeds resulting therefrom should be substituted for and stand in the place of said property for the purpose of being distributed to and among the creditors and claimants of and against

said property, according to the irrightful priority to be determined by this Honorable Court.

Tenth. That your orator, the complainant, hereby makes the original bill in this proceeding filed a part of this amended bill as if here and now fully set out.

Wherefore your complainant would respectfully pray that the said Guarantee Trust & Safe Deposit Company, together with any and all other person or parties claiming any interest in or a lien upon the property in these proceedings mentioned, who have not already become parties, be made such by the issuance and service of proper pro cess, in order that the rights of all such persons may be ascertained and fixed by the decrees of this court, and that the sale to the said City of Greensboro may be confirmed and consummated in such manner as that the said city may get a perfect and indefeasible title, free and clear from all claims whatsoever, and it will ever pray.

THE GUARDIAN TRUST & DEPOSIT CO.,
By BYNUM & BYNUM, Solicitors.

Endorsed:

Filed in this office Aug. 8, 1901.

SAM'L L. TROGDON, Clerk.

EQUITY SUBPŒNA.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF N. CA.
(61) IN THE CIRCUIT COURS, 4TH CIRCUIT.
AT GREENSBORO.

The President of the United States of America to the Marshal of the Western District of North Carolina—Greeting:

You are hereby commanded to summon Guarantee Trust and Safe Deposit company, of Philadelphia, citizen of and resident in the State of Pennsylvania, if *he* be found in your district, to be and appear in the Circuit Court of the United States for the Western District of North Carolina aforesaid, at Greensboro, on the first Monday in September next, to answer a certain bill in chancery, filed and exhibited in said court, against The Greensboro Water Supply Company of Greensboro, North Carolina, by The Guardian Trust and Deposit Company of Baltimore, citizen of and resident in the State of Maryland, to receive,

perform and abide any order, judgment or decree of the court made therein.

Hereof you are not to fail, under the penalty of law thence ensuing, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Greensboro, in said district, the first Monday in April, 1901, and in the one hundred and 26th year of the Independence of the United States.

{ Seal. }

Issued the 8th day of August, 1901.

SAM'L L. TROGDON, Clerk.

MEMORANDUM.—The within named defendants are notified that unless they enter their appearance in the Clerk's office of said Circuit Court, at Greensboro aforesaid, on or before the day to which the said writ is returnable, the (62) complaint will be taken against them as confessed, and a decree entered accordingly.

SAM'L L. TROGDON, Clerk.

MARSHAL'S RETURN.

Received August 8th, 1901. Returned not executed, the parties not to be found in the district. This August 8th, 1901.

J. M. MILLIKAN,
U. S. Marshal.
By J. T. MILLIKAN,
O. D. Marshal.

Endorsed:

Filed in this office Aug. 8, 1901.

SAM'L L. TROGDON, Clerk.

Q. This is for salary due Mr. King prior to his appointment as receiver of the company? A. Yes, sir.

Q. Here is a bill in favor of W. J. Benbow. What is that for, and state if it was a necessary charge against the company? A. We had a drought and Mr. Benbow agreed to stop using the water in his mill, and let us have it, He shut his mill down and let us have the water at the rate of $5.00 per day. It ran from July to September, 20 days, I think, and he agreed to take $100 for it.

Q. It was necessary? A. Yes, sir. It kept us up for nearly 30 days.

Q. This bill in favor of Tatum & Taylor for $7.10, what is this for? A. That is for buggies and horses hired to go out to examine the water supply for the company. It is about three miles from town. We had to have the conveyance.

Q. Bynum & Bynum, for services rendered, $1,000. Were these services necessary, and what were they? A. They were necessary in suits against the company. They assisted Mr. King.

Q. Here is a bill for King & Kimball for a like amount of services. Is that a proper charge also? A Yes; for professional services in suits against the company.

Here the witness offers the accounts of each item testified to above, which series of accounts are attached together and marked Exhibit "L."

Q. Who furnished and laid the pipe on Summit ave-
(81) nue and the streets parallel and at right angles thereto? A. Mr. Ceasar Cone, commencing where Summit avenue intersects Church street, and laid it almost out to his residence, a six inch pipe right under Summit avenue. There is one pipe at right angles to that one down Chestnut st., that belongs to the water company.

Q. Was this pipe laid under an order of the city in pursuance of the contract under which the defendant was furnishing water to the city? A. No, sir, not at all.

Q. With whom was the contract made for laying this pipe and what were the terms thereof? A. The contract was made with Mr. Ceasar Cone.

Q. Whose property was this pipe and the hydrants to be and remain? A. Mr. Cone's.

Q. Did Mr. Cone furnish the hydrants as well as the pipe? A. There are no hydrants on that line. We, as a water co., put in one hydrant at the time of the fireman's tournament as an accomodation to them. There are no others on that line.

Q. Has Mr. Cone ever been paid for this pipe? A. No, sir.

Q. What was the outlay, if you know? A. I think it was about $2,000. These figures are about right, I am certain. He ran a part of the way with 4 in. pipe and part with 2 in. pipe.

Q. About what did it cost to run it from where he stopped out to his house? A. I suppose, two or three hundred dollars. We had nothing to do with that. (Here counsel shows witness a paper writing purporting to be a contract between Ceasar Cone and the Greensboro Water Supply Co.)

Q. Is this the contract so far as reduced to writing, made between Mr. Cone and the company? A. This is (82) the contract.

The contract is marked Exhibit "M."

Q. This contract was made in duplicate? A. Yes; each party signing the copy delivered to the other.

Q. Under the terms of this contract, has Mr. Cone gotten his proportion of the water rentals? A. No, sir; I rendered the bill up until Mr. King was appointed receiver. I filed it with Mr. King. I don't remember the amount.

Q. How much was due Mr. Cone under the contract on account of water rentals? A. It was less than $100.00 Do not remember exactly the amount.

Witness files an account of the actual amount due Mr. Cone under the contract, Exhibit "M," which account is filed and marked Exhibit "N."

Q. Has the company ever paid Mr. Cone? A. No, never a cent.

Q. This pipe was to be and remain his property until it was paid for? A. That is the understanding, yes, sir.

CROSS EXAMINED BY MR. A. L. BROOKS, COUNSEL FOR CREDITORS.

Q. Mr. Glenn, has there been paid the counsel in the defense of these suits any fees, and if so, how much? A. In regard to these suits against the water company?

Q. Yes. A. I answer from memory. I think there was only $50.00 paid Bynum & Bynum and probably $100.00 or $150.00 paid King & Kimball. Not over that in either case.

Q. Have you, as president, made any recommendation prior to this as to the amount of fees to be received by counsel? A. No, sir, it was always "kinder" left to me

(83) to try and pay what we could pay. The amounts stated as paid counsel were merely as retainer fees.

Q. General, considering the amount of work done, do you think the fee a reasonable one? A. Yes sir. Those suits involved over $60,000. I consider that the determination of one was a determination of all.

Q. I will ask you, Mr. Glenn, if, at the time of placing this company in the hands of a receiver, if the only pleadings filed by the defendant water company, if any of these suits, had been simply in the Gorrell case which only involved $5,000.00? A. I don't know, sir, about that.

Q. You swore to the complaints, did you not—don't you remember when they were filed? A. I don't remember when they were filed.

Q. At the time the defendant company was put into the hands of a receiver, had any of the suits been tried except the Gorrell suit? A. No, sir.

Q. Do you think, then, that the defense of a suit for $5,000, which the company lost, would be reasonably worth a fee of $2,000? A. As I stated before, I took it into consideration that the direction one of those suits took would be the direction of all of them, and then I think they compromised the Gorrell case and saved at least enough to make the attorneys fees out of that

It is agreed by all parties that the Gorrell suit has been brought, tried on demurrer and appealed and tried in the Supreme Court. The answer was thereafter filed and the case tried and finally disposed of before the receivership by judgment for the plaintiffs; that the other suits for which claims have been filed had been brought for more than a year prior to the receivership; that no pleadings in any of them were filed till after the receivership, but as the points in these were the same as in the Gorrell case, they had been in course of preparation.

Q. When were the other claims, which have been (84) proven by you under Exhibit marked "L" contracted with relation of the appointment of a receiver? A. Sometime previous to it, every one of them.

Q. Why were they not paid by the company? A. Because some of them had not been rendered, and there were other things we thought more pressing.

Q. Have you the books showing receipts and disbursements of the Greensboro Water Supply Company since its organization? A. Yes, I kept the books. Mr. Taylor asked me to send them to Baltimore and I did so.

Q. Do you remember about what the net profits annually were from the operation of the defendant company?

A. The water supply company commenced January, 1897, as a company, and each year there was a marked increase in the revenue.

Q. About how much were the net profits derived from the operation of the company for the year 1897? A. I could not be positive. There was really no profits whatever because the board of directors ordered me to put all of the money into improvements of the plant. We spent all of the money over and above what expenses and the interest on the bonds in the improvement of the plant.

Q. By whom was the expenditures for improvements made, the direct expenditures? A. By myself, as president and manager. I filed a report once every three months with the board of directors showing the amount collected and the names from whom collected, and also the amount paid out and to whom paid out.

Q. Were all of the profits for the years 1897, 1898, 1899 and 1900 up to the time of the appointment of the receiver expended on improvements? A. Yes, all of it. I paid Mr. Taylor a fee of $300.

Q. Please state the net profits, as near as you can, for the years 1897, 1898, 1899 as earned by the plant? A. I said that everything was paid out in improvements.

(85) Q. How much was it? A. We estimated that for the 4 years, the improvements amounted to about $10,000.00, for each year about $2,500.00, and average of $25,00.

Q. What did you say were your net profits for 1900? A. I did not have charge for the whole year. Receiver was appointed.

Q. Well, from October, 1899, to October, 1900? A. That is a hard question to answer, to know exactly, or rather, to separate what was absolutely necessary, and what was put in to the betterment of the property.

Q. What was the earning capacity of the property during that year, the net revenue earned from the operation of the plant? A. It would be a hard matter for me to state, because all of the money earned by the plant was paid out on improvements.

Q. We want to know what amount was gotten in, not what you paid it out for? A. I suppose it would be about $2,500.00 the amount received over and above running expenses, and interest on bonds.

Q. Was the fund received from the plant for 1900 reinvested in improvements, and, if so, in what way? The profits, I mean? A. The funds for 1900 were paid in improvements, but there were not as much improvements made in 1900 as in years before, because we had to incur

debts, and we paid up and eliminated all of those debts, and everthing of that kind were all paid off when I turned this over to Mr. King, as receiver, except the amounts I have shown there.

Q. Have you a book showing the amount of disbursements during the years 1897, 1898, 1899 and 1900? A. Yes, sir.

Q. Can you produce it? A. I sent it to Baltimore. I have files that I can swear to as being correct.

Counsel for creditors requests of counsel representing complainants the books of the Greensboro Water Supply (86) Company, showing the receipts and disbursements of the said company for the years 1897, 1898, 1899 and 1900.

Complainant's counsel answers that he will present creditors' counsel with the reports of the president of the company fully showing all of said accounts.

Q. What sum do you include in your expense account or calculation account by way of expenditures other than those made for the local improvement of the company's property? A. I included in the expense account the coal, oil, salaries; then the incidental expenses that were necessary to run, and there were always improvements to be made, either by order of the city or the board of directors, and I simply rendered an account of the money paid out, all of which items are included in the reports above referred to.

Q. What sums did you pay by way of interest to the Guardian Trust and Safe Deposit Company, or otherwise? A. I paid interest on $110,000, which amounted to $5,500 per year.

Q. Have you, at any time since the organization of the company, paid any dividends to any of the stockholders? A. None whatever.

Q. Have you paid interest on $50,000 of bonds of the Greensboro Water Company other than through the Guardian Trust & Safe Deposit Company? A. No, sir. The $5,500 was paid over to the Trust Company, and they paid the interest.

Q. Have you your stock book of the company? A. No, sir; I have not.

Q. Who has it? A. I suppose Mr. W. C. Seddon, the secretary, in Baltimore, has it.

Q. Were the $110,000 of bonds referred to in the deed of trust from the Greensboro Water Supply Co. to the Guardian Trust & Safe Deposit Company issued? A. I (87) suppose they were issued. I signed them.

Q. They were executed by the company? A. They were signed by myself, as president, and Mr. King, as treasurer.

Q. Did your company receive from the trustees any of the $110,000 bonds upon which you have been annually paying interest? A. I don't know, sir. I did not.

Q. You don't know that the company has? A. No, sir. $50,000 of them were set aside to take up the first $50,000 with.

Q. That was done? A. I think so. I was simply general manager of the company, and Mr. King was treasurer here, and the men in Baltimore did the rest. We were out of it. They had a majority of the directors there, and three made a quorum.

Q Did you get any of the proceeds from the $60,000 of second mortgage bond, which was the amount above the $50,000 result? A. Don't know anything of it.

Q. Do your reports to the directors show a total amount paid by your company during the term of its operation to the Guardian Security, Trust & Deposit Company? A. No, sir. The reports nor books show nothing of that sort. I simply put in an estimate of how much it was. I did not handle that money. The reports show the payments to John S. Gettings & Co., and I sent them checks, and they paid them off.

RE-DIRECT EXAMINATION.

Q. What amount of bonds were first issued by the Greensboro Water Company secured by deed of trust to Guardian Trust & Safe Deposit Company? A. I don't know that of my own knowledge.

Q. Don't you know what amount of bonds were issued by the Greensboro Water Co., and secured by deed of trust (88) by that co. to the Guardian Trust & Deposit Co., of Philadelphia? A. I had nothing to do with the original company. I know I was notified by an order of the court that I was appointed receiver. Yes, I know that I was notified of the amount of the issue.

Q. We want to know if you know the amount of that issue of bonds? A. $50,000.

Counsel for creditors objects to the question and answer.

Q. Are these bonds outstanding to-day? A. Yes, sir.

Q. State whether or not you have been paying the interest on them, and whether annually or simi-annually, and and what was the rate of interest? A. The interest has been paid.

Q. Have you been paying the interest on that $50,000 worth of outstanding bonds from the time they were issued until the company went into the hands of the receiver? A. I know that we have been paying it.

Q. What rate of interest, and how often did you pay it? A. Six per cent., semi-annually.

Q. What amount of bonds were issued by the Greensboro Water Supply Company, and when were they issued? A. $110,000. I think they were issued in July, 1896.

Q. Were they secured by this deed of trust, July, 1896, executed by the Greensboro Water Supply Co. to the Guardian Trust and Deposit Company, of Baltimore? A. Yes, sir.

Q. Are they still outstanding? A. Yes, sir.

Q. Please state what amount of bonds secured by deed of trust, July 1st, 1896, executed by the Greensboro Water Supply Co. to the Guardian Security, Trust & Deposit Co., of Baltimore City, are held by that company for the purpose of taking up the first $50,000 issued by the Greers-
(89) boro Water Co. at their maturity? A. $50,000.

Q. At the time of this second deed of trust when the water company went into the hands of a receiver, what amount of bonded indebtedness was then outstanding against it? A. $50,000 of first mortgage bonds and $30,-000 of second mortgage bonds.

Q. While in the hands of the receiver, what amount of receiver's certificates were issued? A. $15,000.

Q. Was there any other amount over the certificates? A. About $3,000.

Q. How was that indebtedness liquidated? A. By order of the U. S. Court, and the sale of the $110,000 of bonds.

Q. By order of the court the property was sold and the bonds issued? A. Yes, sir.

Q. Please state, if you know, whether or or not this $110,000, and the $50,000 bonded indebtedness are still outstanding? A. Yes; I know it.

Mr. Wilson, counsel for creditors, objects to all the questions and answer of J. D. Glenn, with reference to the issuance of the bonds or the payment of interest on bonds or of the amount outstanding, as testified to under the direct examination of W. P. Bynum.

RE-CROSS EXAMINATION BY A. L. BROOKS, COUNSEL FOR CREDITORS.

Q. Can you swear, of your own knowledge, whether or not $50,000 were issued by the Greensboro Water Co.,

and are now outstanding, or that that they are now held by the Guardian Trust & Deposit Co., of Baltimore City? A. No, sir; not of my own knowledge.

Q. Do I understand to say that your company has been since '97 paying interest on $50,000 of bonds issued (90) by the Greensboro Water Company? A. That is my understanding, sir.

Q. To whom? A. I don't know the difference between the two companies, the trustees in the two deeds of trust. I would go to the city clerk and see that the warrant was sent—the warrant for the interest, and then I would send the difference in what the city paid and the interest to Jno. S. Gettings & Co., and they would send me a receipt for it.

Q. Who is Jno. S. Gettings & Co., and for whom were they acting? A. They are bankers in Baltimore. Mr. Bosley, of that firm, was one of the directors of the Greensboro Water Supply Co.

Q. Can you give me more definitely the parties to whom the interest annually upon $50,000 was paid on these Greensboro Water Companies bonds? A. No; I don't know positively. I know I had the drafts, and would go to the clerk, and he sent it.

Q. Do your reports filed with the directors show it? A. No, sir; they do not.

Q. To whom was the payment of the interest on the $110,000 of bonds made? A. It was paid to that Baltimore Guarantee Co., whatever its name is.

Q. Do I understand you to say that your company has been paying interest upon $50,000 of the Greensboro Water Co. bonds, and also on the $110,000 of the Greensboro Water Supply Companies bonds? A. We have been paying $5,500 interest.

Q. Just answer yes or no, please? A. They have been paying $3,000 interest on the first $50,000 issued by the Greensboro Water Company, and they have been paying $2,500 on the second mortgage bonds, that is the Greensboro Water Supply Companies bonds.

(91) Q. Has all of this interest been paid to the same trust co. in Baltimore? A. I am not certain as to whom the interest on the $50,000 original bonds of the water co. is paid, but I know positively that $2,500 annually has been sent to the trust co. in Baltimore for the bonds of the Greensboro Water Supply Company.

Q. Have you in your possession date from which you can furnish the master the total amount of interest paid by your company on bonds for 1898? A. My books don't show the payment of the interest, except what was neces-

sary to supplement the city's rent in paying this interest, but the records of the city and the secretary in Baltimore will show that.

Q. What was the rate of interest for the $50,000 of bonds that you have paid? A. Six per cent.

Q. What the rate of the other bonds? A. Five per cent.

Q. The sum total of the amount paid on bonded indetedness was what? A. $5,500 per annum.

Q. What is the total amount of bonded indebtedness that your company paid interest on for 1898? A. $110,000.

Q. I will ask you if it is not a fact that of your knowledge the only interest account you paid in 1898 was paid to the Guardian Security, Trust & Deposit Co. of Baltimore City, either by you or the city at your direction? A. No, sir, I don't know that of my own knowledge.

Q. Is not that your best impression? A. No, sir, I don't know who the clerk sends that to.

Q. Through what bank *was* these payments of interest made? A. I generally endorsed the warrant and the (92) clerk endorsed his own warrant. I kept our deposits in the Greensboro National Bank.

Q. Were all of the remittances that you made on interest on bonds made to the Guardian Security, Trust Deposit Co. of Balto.? A. My impression is that I sent most of the money that I sent for interest to Jno. S. Gittings & Co. and they paid it out to the trust company, I suppose, sir. I don't know.

At the end of the testimony of Jas. D. Glenn, counsel for complainant states to the court that he desires to introduce proof showing the outstanding bonds and the ownership thereof and the payment of interest thereon, which matter is in the City of Baltimore. It would be a very great inconvenience to bring the officers of the trust co. and other witnesses in that city to Greensboro, and requests the master to take testimony, at such time as may suit the convenience of himself and all counsel interested, in the City of Baltimore.

On this request of counsel for complainant, the master adjourns to meet at the office of Messrs. Taylor & Keech, at No. 205 East German street, in the City of Baltimore, Md., on Wednesday, May 1st, 1901, at ten o'clock A. M.

Endorsed:

Filed in this office Aug. 5, 1901.

SAM'L L. TROGDON, Clerk.

EVIDENCE TAKEN AT BALTIMORE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(93) WESTERN DISTRICT OF NORTH CAROLINA.

In Equity. No. 151.

Guardian Trust and Deposit Company, of Maryland, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.

Pursuant to the last order of adjournment, the master held a session at the office of Messrs. Taylor and Keech, in the Keyser Building, No. 205 East German street, in the City of Baltimore, on Wednesday, May 1st, 1901, at 10 o'clock, A. M.

Present: Messrs. TAYLOR and KEECH for the complainant;
A. L. BROOKS, ESQ., for the creditors as heretofore;
R. R. KING, receiver.

By consent the commission adjourned to meet at one o'clock, P. M.

H. CLINTON MERRYMAN, being duly sworn, deposes and says:

DIRECT EXAMINATION.

1 Q. (Mr. TAYLOR) Please state your name, age, residence and occupation? A. H. Clinton Merryman. Secretary and treasurer of the Guardian Trust Company of Baltimore City; of legal age. I reside in Baltimore.

2 Q. How long have you been connected with the Guardian Trust and Deposit Company, as an official, Mr. Merryman, or an employee? A. Since January 1st, 1899.

3 Q. Do you mean in your present official position: my question is, how long have you been in their employment? A. Well, since June 23rd, 1898.

4 Q. Please state if the Guardian Trust and Deposit
(94) Company is the same company which was originally denominated the Guardian Security, Trust and Deposit Company, of Baltimore City, the trustee mentioned in the mortgage of date July 1st, 1896, a copy of which mortgage, Complainant's Exhibit G, has been filed in this case, and the original of which I now show you? A. Yes, sir; the present company is the same company as this deed of trust makes reference to.

5 Q. When was your name changed, and by what au-

the case of A. M. Scales, assignee of A. A. Hinkle *vs.* Greensboro Water Supply Co., and A. M. Scales, assignee of Hodgin, Pegram & Co. *vs.* same, creditors; also A. M. Scales, of counsel for Southern Stock Mutual Life Insurance Co., creditor. Mr. Scales also represented the counsel in the case of B. J. Fisher *vs.* defendant company.

By consent of all parties present, the cause was continued until Thursday, April 11, 1901, at two o'clock, when the hearing would be resumed.

Pursuant to adjournment, the hearing was had at the office of the Clerk of the United States Circuit Court, at Greensboro, N. C., April 11th, 1901. Present; R. R. King, receiver; Levi M. Scott, John N. Wilson, A. B. Kimball, representing same parties as above set forth at the first sitting; King & Kimball, creditors; Col. John N. Staples, of counsel for B. J. Fisher, creditor.

(76) R. R. King filed his report, as receiver, marked Exhibit "A." Col. John N. Staples, representing B. J. Fisher, a creditor, came into court and requested ten days within which to file his claim before the master, if he should so advise his client that the claim should be filed at all.

Mr. L. M. Scott and John N. Wilson file the claim of Helen G. Brown, judgment creditor, *vs.* Greensboro Water Supply Co., which is marked Exhibit "I."

It is, by consent of all parties and creditors before the court, agreed that the contract marked Exhibit "B" is the contract referred to as Exhibit "A" in the complaints in the several causes wherein creditors have brought suit against the defendant co.

The hearing was adjourned to meet at the office of King & Kimball on Wednesday, April 24th, 1901, at twelve o'clock, noon.

Met pursuant to adjournment at the office of King & Kimball, on Wednesday, April 24th, 1901, at twelve o'clock, noon. Same appearances as on the last preceding meeting. By consent, adjourned to meet at the office of King & Kimball on Thursday, April 25th, 1901, at 9:30 o'clock, A. M.

Met pursuant to adjournment at the office of King & Kimball on Thursday, April 25th, 1901, at 9:30 o'clock, A. M. Same appearances as in the last two preceding meetings, Judge Wm. P. Bynum appearing for the complainant.

The complainant offers in evidence the record of the mortgage of the Greensboro Water Company to the Guardian Trust & Safe Deposit Co., of Philadelphia, recorded in Book 72, pages 653 *et seq.*, and which deed of trust is filed and marked Complainant's Exhibit "C."

Mr. Brooks, counsel for creditors, reserves any objection he may have to the effect of Exhibit "C" upon the claims of his clients to be hereafter taken.

Complainant next offers in evidence the entire record in the case of J. W. Middendorf et als. *vs.* Greensboro Water Co., an action instituted in the Circuit Court of the United States for the Western District of North Carolina, (77) at Greensboro. A copy of so much of the record as is deemed by the plaintiff, material is offered and marked Complainant's Exhibit "D."

Counsel representing creditors makes the same objections as made to the introduction of Exhibit "C."

Plaintiff next offers in evidence the record of the deed from R. R. King and A. H. Taylor, commissioners, to Hugh L. Pope, dated April 30, 1896, and recorded in Book 104, page 652, in the office of the Register of Deeds for Guilford county, a copy of which deed is marked Complainant's Exhibit "E."

Counsel for creditors interpose the same objection as to introduction of Exhibit "C."

Complainant next offers in evidence the record of the deed from Hugh L. Pope to the Greensboro Water Supply Company, dated April 30, 1896, and recorded in Book 104, page 656, in the office of the Register of Deeds for Guilford county.

Counsel offers copy of deed which is marked Complainant's Exhibit "F."

Complainant next offers in evidence record of deed of trust from Greensboro Water Supply Company to the Guardian Security Trust and Deposit Company of Baltimore City, dated July 1, 1896, and recorded in Book 102, page 764, of the Record of Deeds in the Register's Office for Guilford county.

Counsel offers copy of said deed of trust which is marked Complainant's Exhibit "G."

Counsel for creditors makes the same objection as made to introduction of Exhibit "C."

Complainant next offers in evidence record in the case of Charlotte J. Gorrell *vs.* Greensboro Water Supply Company, an action brought in the Superior Court of Guilford county on the 11th day of August, 1897, and in which final judgment was entered on the 5th day of February, 1900, and docketed in the office of the clerk of the said court in Book "F," page 4, case No. 13.

The plaintiff next offers in evidence the transfer of the judgment in the action of Charlotte J. Gorrell against Greensboro Water Supply Company from Charlotte J. Gorrell to the Guardian Trust & Deposit Co. of Baltimore, (78) complainant in this action, dated December 7, 1900. Complainant's counsel offers the original of the above transfer and copy thereof. On comparison by the master the original is returned to the complainant. Complainant files copy of said transfer marked Complainant's Exhibit "K."

Counsel for Helen G. Brown, a creditor, objects to the introduction of the above evidence of the claim of Charlotte J. Gorrell.

The complainant offers in evidence the original bill filed in this cause.

Counsel of Helen G. Brown, creditor, enter objection to the above evidence.

A. L. Brooks, counsel for creditors, offers the following claims: A. M. Scales, assignee of A. A. Hinkle, and A. A. Hinkle *vs.* Greensboro Water Supply Company, attached to which is a statement of cause of action, marked Creditors' Exhibit No. "2;" A. M. Scales, assignee of Hodgin, Pegram & Co., and G. S. Hodgin, W. W. Mendenhall and C. B. Wilson, trading as Hodgin, Pegram & Co. *vs.* Greensboro Water Supply Company, marked Creditors' Exhibit No. "3;" Southern Stock Mutual Insurance Company *vs.* Greensboro Water Supply Co., marked Creditors' Exhibit No. "4;" B. J. Fisher *vs.* Greensboro Water Supply Company, marked Creditors' Exhibit No. "5."

Complainant enters general objection against the claims filed marked "1," "2," "3," "4," "5."

Creditor, Helen G. Brown, enters general objection to the filing of the claim of the Southern Stock Mutual Life Insurance Co., marked Exhibit No. "4."

GEN. JAS. D. GLENN, being first duly sworn, testifies as follows:

Q. You are president of the water company? A. Yes, sir.

Q. You have had charge of its business for several years, the incurring of expenses prior to the receivership, have you not? A. Yes, sir.

Q. Here are some items of accounts. I will take them up in order and ask if the are proper charges. Here is an (79) item in favor of Odell Hdw. Co. for $2.83. What was that for? A. That is for material that was furnished the Co., lead and oil, etc.

Q. It is a proper charge? A. Yes, sir; it is all right.

Q. Was this item not incurred in the management and conducting of the company as a going concern? A. Yes; sir.

Statement of account filed in favor of Odell Hdw. Co.

Q. I hand you another account in favor W. P. Richardson & Son. Examine it and state what it was for? A. It was for oil, $18.00.

Q. There is an account of the Greensboro Publishing Co. What was that for? A. This is on account of notices about water and different advertising about consumers in using their water at night, etc.

Q. Was it a necessary outlay? A. Yes, sir.

Q. Here is the account of O. D. Boycott. What was this bill for? A. This is for work on the tank in repairing a leak.

Q. It was a necessary outlay? A. Absolutely necessary.

Q. Referring to the account of Caster, Curran & Bullitt, is that a proper charge, and did the co. get the benefit of it? A. Yes, sir; it is for coal, and absolutely necessary for the running of the pumps.

Q. J. R. Rich & Sons, $17.78. Is that a proper charge? A. That is on account of plumbing work, putting in meters and repairing pipe, etc., which was necessary to be done.

Q. Merchants Grocery Co., is that a proper charge? A. That is a proper charge. It was for alum necessary for the filteration of the water.

Q. Here are some telephone bills. What about them? (80) A. They are necessary, as we have to be connected in case of fire all the time. That bill is for rent on account of use of 'phones.

Q. Here is a bill for R. R. King, treasurer, salary $75? A. I always paid Mr. King his salary—he only drew a nominal salary of $25.00.

been filed in these proceedings, as Complaintant's Exhibit K, and state if your company, within your knowledge, advanced the $3,500 to purchase that judgment therein recited? A. We did, sir.

35 Q. Has it been paid you or is it still due? A. It is still due.

Mr. BROOKS: I desire to offer an objection to that.

36 Q. Please state, Mr. Merryman, whether your company has acted as agent for the Greensboro Water Supply Company in paying the coupons, both upon the first mortgdge bonds of the Greensboro Water Company and of Series A and B bonds of the Greensboro Water Supply Company? A. We have.

Mr BROOKS: I object to that question as leading and also that the agency should be established otherwise than by parole.

37 Q. For how long have you paid those coupons? A. Since my connection with the company, 1898.

38 Q. Have you any knowledge of what was done be- (100) fore, from your acquainance with the company's affairs, up to that last date? A. I think I can safely state that even before that time they acted as, or they paid the coupons.

Mr. BROOKS: To that we object.

The MASTER: That would not be competent testimony, if you insist upon it as necessary to show the payment of interest prior to the time that he knows about it.

Mr. TAYLOR: No, I do not care about that at all. Le it stand subject to the objection.

39 Q. Well, what was done with the company, when you paid those coupons, do you know? A. Well, as trustee, we hold the coupons.

40 Q. Is it your custom to cancel them when duly paid? A. Yes, sir.

Mr. BROOKS: To that we object.

41 Q. Have you those coupons at present in your possession, are you aware? A. I think we have.

42 Q. If so, are they paid and cancelled?

Mr. BROOKS: I want to state that we desire to object to that on the ground that the coupons are the best evidence.

A. I cannot answer that question off hand.

43 Q. Well, when your company paid the coupons, you understood that you were paying them, and that therefore they ought to be cancelled, did you not?

Mr. BROOKS: One minute; we submit that those questions are leading and improper and we would like the master to rule them.

Mr. TAYLOR: Well, it is our custom here, gentlemen, just to note the exception, and let the witness go on.

The MASTER: I can do either as you like, gentlemen; either pass on the questions or just allow them to go in; if I were to rule on this I should exclude the question.

(101) A. If you will allow me to answer that, I can only state the usual procedure; it is not my duty to cancel the coupons; I can only tell you what we do, and assume that they are cancelled.

44 Q. That is what I want to know; I want to know your custom when you are acting as agent in the payment of coupons? A. We cancel them upon payment, if that is what you want to bring out, although I have not seen these coupons in question, and I want to be accurate in what I say. I have, by my subordinates, seen them, through his eyes, if you will allow me to explain; through his eyes I have seen these coupons, and I am willing to testify to what is the custom of our business.

Mr. TAYLOR: That is just what we want.

CROSS EXAMINATION.

1 X-Q. Mr. BROOKS: Mr. Merryman, please state whether you have a record of the names of the parties to whom the bonds of the Greensboro Water Supply Company, beginning with No. 51, inclusive, of Series A, and all of Series B, were issued? A. I don't think we have.

2 X-Q. By whom were those bonds deposited with your company? A. By various holders or by their representatives.

3 X-Q. Have you any record of the parties surrendering those bonds, the names of the parties surrendering those bonds, or the parties to whom you issued the receipts, as filed as part of your evidence in this case? A. I don't think we have. You see, bonds pass by delivery, and they are not registered bonds, and the receipts furnished us had no stubs, and my impression is that we kept no record. The clerk who has receipted for them kept no record.

4 X-Q. How do you know that the bonds in your hands, deposited with you, to whom they belong? A. Well, the evidence of holding them would seem to me to

prove that they were the depositors or agents of the depositors of the bonds.

5 X-Q. Have you no record or any other means of (102) knowing to whom these were issued, and by whom they were surrendered, or who holds your receipt for the bonds? A. Not that I can give offhand.

6 X-Q. Well, I mean in your office? A. I think not.

7 X-Q. Do you know of your own knowledge that those bonds or any of them have ever been issued to a *bona fide* holder for value? A. No, I do not.

8 X-Q. Do you know whether any of the first mortgage bonds of the Greensboro Water Company were issued to a *bona fide* holder for value? A. I do not.

9 X-Q. By whom were the thirty-eight bonds of the Greensboro Water Company deposited with your company? A. By various parties.

10 X-Q. Well, will you give me the name of the parties, depositors of the same? A. I am not in possession of that information.

11 X-Q. Will you please give me the names of the parties to whom you issued receipts, a copy of which is filed as a part of your evidence, for those bonds? A. We delivered those certificates to the various persons who presented the bonds, on their presentation.

12 X-Q. I believe you stated you could not give the names of the parties? A. I cannot give them to you offhand, and I am under the impression that we could not give you that information.

13 X-Q. Do you know of your own knowledge whether any of the bonds, either of the Greensboro Water Company or the Greensboro Water Supply Company, had ever been sold to *bona fide* holders for value? A. I do not.

14 X-Q. State whether or not your company has ac- (103) cepted, and undertaken the trust created by the conveyance made from the Greensboro Water Supply Company, dated the first day of July, 1896, a copy of which is marked "Exhibit G?" A. We have.

15 X-Q. State what amount of money you have received annually from the Greensboro Water Supply Company since the conveyance above referred to? A. I would be compelled to refer to books at the office for that information.

Note.—It is agreed that witness shall consult his records and furnish to the commission, to be incorporated in his testimony, the amount of payment asked for by counsel.

16 X-Q. Have you received regularly or annually from

the Greensboro Water Supply Company a sum equal to the interest upon the bonded indebtedness secured by the deed of trust above referred to? A. The books will be submitted for your examination, and will show what we have received, and I had rather give you book information.

17 X-Q. Not as to the amount, but do you know whether or not that, as a fact, it has received annually from the Water Company a sum equal to the interest on the indebtedness secured in the deed of trust? A. I could not answer that off-hand.

18 X-Q. Will your books show? A. Our books will show the amount of money received, unquestionably.

19 X-Q. From whom were the remittances of the earnings, etc., from the Greensboro Water Supply Company made to you, or by whom, either way? A. Mr. Brooks, all this detailed information can best be gotten at the office. You see, we have a number of corporations for which we are trustee, and it is very hard to associate them in one's mind, you know.

(104) 20 X-Q. State whether or not all of the funds which you have received upon this deed of trust have been made by the Greensboro Water Supply Company? A. That is office information that I must ask you to get over there.

21 X-Q. How long have you had in your possession the thirty-eight bonds, or any part thereof, of the Greensboro Water Co.? A. It is impossible for me to say with exactness.

22 X-Q. About how long? A. I should say, two months, if you want such a statement off-hand.

23 X-Q. How long have you been collecting from the Greensboro Water Supply Company interest due upon those bonds? A. That is information that can best be given to you at our office from the books.

24 X-Q. You cannot state as to that? A. No, sir; it is utterly impossible for me to carry these things in my head.

25 X-Q. You spoke in your direct examination of having certified to the issue of bonds from Nos. 51 to 110 of the Greensboro Water Supply Company, do you know to whom those bonds were given? A. They were delivered in accordance with the provisions of the deed of trust, I presume, to the Greensboro Water Supply Co.

RE-DIRECT EXAMINATION.

1 R-D-Q. Mr. TAYLOR: I will ask you just one question, Mr. Merryman, if, upon inquiry, you find that any sort of memorandum was retained in your company's office when these various bonds were delivered to it under

the two forms of receipts which you have filed here as exhibits, will you be kind enough to have prepared a list of those for us, and deliver it to the commissioners, mail it to the commissioner, and I desire to agree that he shall receive such list without your being called upon to testify to it? A. I will do that with pleasure.

(105) Mr. BROOKS: And I desire to disagree.

H. CLINTON MERRYMAN.

In response to request of Mr. A. L. Brooks, agreed to by Messrs. Taylor & Heech, I will add that we received from the Greensboro Water Supply Company, in the year 1900 and 1901, the sum of seven thousand dollars ($7,000) which paid the coupons on all the first mortgage bonds of the Greensboro Water Company to February 1st, 1901, inclusive, and coupons on all outstanding bonds of the Greensboro Water Supply Company to July 1st, 1900, inclusive.

H. CLINTON MERRYMAN.

JOHN S. GITTINGS, a witness called and sworn for the plaintiff, testified as follows:

DIRECT EXAMINATION.

Q. (By the MASTER) State your name, age, residence and occupation? A. John S. Gittings, banker, fifty-three years of age, Baltimore, Maryland.

Q. (By Mr. TAYLOR) Please state whether you acted as a committee or agent for the holders of the securities of the Greensboro Water Company or the Greensboro Water Supply Company, in communicating with the various owners of the bonds of the said company, which resulted in their deposit with the Guardian Trust and Deposit Company, under the two forms of receipt shown you here, marked H. C. M. No. 1 and H. C. M. No. 3?

Mr. BROOKS: Objected to as leading.

A. I acted as committee under certificate marked "Complainant's Exhibit H. C. M. No. 3."

Q. Look at this certificate H. C. M. No. 3? A. Yes, sir; I acted as committee under that certificate.

(106) Q. Did you communicate with those bondholders, and endeavor to induce them to deposit the bonds upon the terms to which they seemed to have agreed under that certificate? A. I did.

Q. How many of the bonds did you succeed in locating? A. Forty-nine.

Q. And what was your method of locating the various

holders of the bonds? A. To ascertain who they were, I wrote to them or saw them, and received their assent to this.

Q. And how did you procure the names of the owners? A. By personal solicitation.

Q. How did you inform yourself of the names of the owners? A. I had a list of the owners, as the coupons were paid to the different agencies; it is customary to endorse on the coupon envelopes the person who receives the money for the coupons, or the agents to which that money is paid.

Q. Where was it that the names of the persons by this identification of the coupons were thus reached or obtained by you? A. At the Guardian Trust Company.

Q. When those bonds were thus deposited in accordance with that list, Mr. Gittings, at the Guardian Trust and Deposit Company, did you, yourself, obtain a list of the persons who made that deposit? A. I did.

Q. Were there any of the holders of these bonds with whom you have been unable to communicate as yet? A. Only one.

Q. Who is that, so far as you know, and what number of bond? A. That is a bond, as well as I remember, No. 11, and the last matured coupon in February has never been presented. Prior to that time it had been presented and paid, and I suppose it will come in when the man gets hard up.

Q. The secretary of the Guardian Trust and Deposit Company has just produced here thirty-eight of those (107) bonds as deposited there under the form of receipt mentioned. There is one that you say you have not been able to locate. Do you know the names of the owners of the other eleven, that would be? A. I know the names of the agents, or the owners themselves, I don't know which, I know the names of the parties to whom the coupons of those eleven have been paid.

Q. Well, have you communicated with the parties holding them? A. The whole eleven, yes, sir.

Q. And can you state who they are, and what number of bonds, respectively, is held by each? A. I can state who they are, but I don't remember the numbers.

Q. I do not mean the numbers, but what number of bonds is held? A. One party holds ten, and another party holds one.

Q. Just mention the one party holding one, and other party holding eleven? A. Mr. Seddon holds ten, and Mr. Shaw holds one as representative of Mrs. Branker.

Q. Are you acquainted with Mr. Shaw and Mrs.

Branker? A. Well, with Mr. Shaw, yes, sir; I do not know what Mrs. Branker it is.

A. Have you had any communication from Mr. Shaw as to what he is willing to do with the bond? A. He has signed an agreement to deposit his bond, which is in a box at the Safe Deposit and Trust Company, as soon as he returns to the city.

Q. For whom does Mr. Seddon hold those ten bonds that you spoke of; have you any knowledge on that subject? A. A man by the name of Wood, I think.

Mr. BROOKS: We object to that.

Q. Have you had any communication with Mr. Seddon as to what he is willing to do, as a representative, say, of Mr. Wood, with these bonds? A. I have.

Q. Well, what is that? A. They will be deposited as soon as he receives his money; as soon as arrangements (108) are made to pay him, the bonds are ready to be deposited.

Q. To be given up? A. To be given up to the trust company.

Q. Or whomever— A. Or whomever pays him; that is all he wants Whoever pays the money.

Q. That accounts for 49, 38 and 11? A. Yes, sir; one out.

Q. That accounts for the whole? A. Yes, sir, but there is one astray.

Q. Has your banking firm, itself, at any time, owned securities of the Greensboro Water Company, and Greensboro Water Supply Co., and dealt in them, and, if so, for how long? A. We have held them of all issues, and dealt in them, for how long, I cannot answer; ever since it was begun; I do not remember the date, 1888, wasn't it? Yes, 1888.

Have you acted yourself, as agent of broker of the securities of the Greensboro Water Supply Company? A. Yes, sir, I have.

Q. Can you state, of your own knowledge, whether, at the time of the sale by the United States Court of the property and franchises of the Greensboro Water Company, and its purchase and re-organization by the purchasers into the Greensboro Water Supply Company, whether the first mortgage bonds of the Greensboro Water Company were then outstanding?

Mr. BROOKS: We object to that.

A. They were.

Q. Well, what knowledge have you on that subject?

Have you had any acquaintance with the men holding them, and have you had any opportunity to supervise or become acquainted with the payment of the interest upon (109) the coupons? A. I have, both of them.

Q. And can you then state that these fifty bonds of the Greensboro Water Company have remained outstanding from a period prior to the sale and the re-organization into the Greensboro Water Supply Co., and that the interest has been paid by the Greensboro Water Supply Co. on those 50 bonds since that date? A. I can state that.

Q. You can state it; what do you state on that subject? A. I can state that, to my knowledge, the bonds, the first mortgage six per cent. Greensboro Water Company bonds, were outstanding at the time the property was sold, and I can also state that since that period the interest has been paid—

Mr. BROOKS: The same objection to the question and answer.

Q. Do I understand you to say that you procured a list of the persons owning these bonds, that you deposited the same with the Guardian Trust and Deposit Company, as has been mentioned here? A. I did.

Q. Have you that list with you? A. No, I haven't it with me.

Q. Can you make it up, and lodge it with the commissioner? A. I can.

Mr. TAYLOR: Well, I am ready to agree that the witness shall make up that list and lodge it with the commissioner, if counsel on the other side thinks proper to agree.

Mr. BROOKS: I suppose it would be a matter of discretion with the commissioner, and I do not see how I could agree to it; we could not agree to it, unless I had he list here, to cross examine him upon it.

Q. Did you or your company own any of those bonds of the Greensboro Water Company, Mr. Gittings? A. Yes, sir.

Q. How many, and how long have you owned them?

WITNESS: You mean individually, or as a firm?

Mr. TAYLOR: Well, individually and as a firm, both? (110) A. I cannot give you the amount, I do not know; I would have to see that list; it all appears on the list.

Q. Do you recollect how long ago you purchased these bonds? A. About 1888.

Q. Did you give value for them? A. Yes, sir; all of them.

Q. And you have held them ever since? A. Yes, sir; held them ever since.

Q. Do you know whether your firm ever sold any of those bonds of the Greensboro Water Company? A. They did.

Q. At what period?

Mr. BROOKS: Note an objection to the question.

A. I cannot tell you that; since 1888, that must have been.

Q. Did you pay value for all you owned and sold? A. We did: all we bought, and received value for all we sold.

Q. Would it not be possible for you to procure a list of the owners of the bonds of the Greensboro Water Company with whom you have communicated, and bring it here for the commissioner this afternoon? A. I think so.

Mr. TAYLOR: Please do so, then.

CROSS EXAMINATION.

Q. Mr. BROOKS: What position, Mr. Gittings, do you hold in relation to the Greensboro Water Supply Company? A. I am not an officer of the company.

Q. Are you a director? A. I am a director, I believe.

Q. And a stockholder? A. Yes, sir.

Q. And have you been from its organization? A. Yes, sir.

Q. Were you connected as a stockholder, or in any (111) other wise, with the Greensboro Water Company? A. Stockholder, or anywise; well, I don't remember; I cannot tell you about the Greensboro Water Co. It is a long time ago.

Q. How many of the bonds of the Greensboro Water Company did you and your firm hold? A. Well, sir, that I cannot tell you without I get the list.

Q. Do you know whether all of the fifty thousand dollars issued by the Greensboro Water Company were sold to *bona fide* holders for value, of your own knowledge?

WITNESS: The sixes?

Mr. BROOKS: Yes, sir.

A. I do.

Q. You say you do know it of your own knowledge? A. I do, of my own knowledge.

Q. Have you or your house been collecting the interest from the Greensboro Water Supply Company, since its organization, to meet the payment of interest upon its bonded debt? A. The interest has been remitted to the

Guardian at different periods, and paid by them; we did not pay it.

Q. You referred to the Guardian Trust Company? A. Yes, sir, we did not pay the coupons.

Q. Did the remittances pass through you? A. I couldn't tell you that, because it is a matter of clerical work that I did not supervise; I do not see why they should.

Q. Has the interest upon the bonds of the Greensboro Water Company, which you hold, been regularly paid?

WITNESS: Has the interest upon the bonds of the Greensboro Water Company, which I hold, been regularly paid?

Mr. BROOKS: Yes, sir.

A. It has, upon all issues.

Q. Do you hold issues of both companies, the Greensboro Water Company and the Greensboro Water Supply Company? A. I do.

Q. When was the last payment of interest made to you? A. In February, 1901.

(112) Q. State what position Mr. W. C. Seddon, the holder of ten shares of the Greensboro Water Company, above referred to by you, holds.

WITNESS: Ten bonds, you mean, I presume?

Mr. BROOKS: Ten bonds, I mean; what he holds in the present Greensboro Water Supply Company?

A. That of secretary.

Q. Do you know whether he had any connection with the Greensboro Water Company, and if so, what? A. I don't remember what; but I know that he did have with it.

Q. Can you furnish, as a director, or from the books of your concern, the amount of the annual net earnings of the Greensboro Water Supply Company? A. No, sir; of the concern, do you mean, of John S. Gittings and Company?

Q. Yes, sir, or you, as a director of the company? A. No, sir, as a director, I have never had anything to do with the bookkeeping of the Greensboro Water Company.

Q. Well, I thought perhaps that you might have reports? A. They made no reports in that shape; all the reports that have been made will be reports from the books of the Greensboro Water Supply Company.

Q. Where are the books of the Greensboro Water Supply Co.? A. I don't know, sir; I have never seen them.

Q. What disposition, if any, has been made of the fifty thousand dollars issue of Series A of the Greensboro

thority, are you aware? A. By Act of the Legislature of 1896, is my impression.

6 Q. Can you state, Mr. Merryman, whether you know that company to be the plaintiff in this case, which has filed its bill for foreclosure upon the bonds issued under that mortgage, and whether that action was taken by request of the bondholders—the holders of these bonds? A. That action was taken by request of the bondholders.

7 Q. Please look at the original of this mortgage, of which Plaintiff's Exhibit G has been duly proven as a copy, and state on whose behalf that purports to have been signed by the Guardian Trust Company, and whether you know the signature, and what office was held by the signer of that date? A. The signature of Edward Stabler, Jr., is that of the former president of the Guardian Trust and Deposit Company; the signature of Wm. M. Byrn is that of the former secretary of the Guardian Trust and Deposit Company.

8 Q. Do you recognize the seal of the company, the Guardian Trust and Deposit Company, affixed thereto? A. That is the seal.

9 Q. Upon looking at that mortgage, I see that it provides for the issue of one hundred and ten (110) bonds, eighty (80) of which, being numbered from 1 to 80 inclusive, shall be known as Series A, and shall be a lien upon the property, prior to all other liens, and prior to the bonds No. 81 to 110, inclusive, which (95) last mentioned numbers shall be known as Series B, and please state, if you know, whether your company certified these Series A and B, and what was done with the respective numbers, or what was done with the numbers 1 to 50 of Series A of these bonds, as to which directions are given in clause second, page 15, of that mortgage. Please read clause second, and state if you know what was done with the bonds of the numbers therein mentioned? A. After reading this second section, I say that the Guardian and Trust Co., proceeded in accordance with those directions.

10 Q. Then, has your company at present, and has it always held, since the execution of this mortgage, the numbers 1 to 50, inclusive, of Series A, of the first consolidated mortgage bonds of the Greensboro Water Supply Company, in trust to use and apply from time to time, as may be advisable for the purchasing and paying off and acquiring of the first mortgage bonds of the Greensboro Water Company? A. We so hold them.

11 Q. Have you ever used any of them in paying or

applying them to pay for these first mortgage bonds? A. We have not.

12 Q. Have you those bonds with you? A. I have not.

13 Q. Can you tell us whether they are in the state they were when they were first delived to you, with all the coupons from the first date annexed? A. They are in the same condition as when we first received them.

14 Q. You say, as I understand, that your company followed the direction of that clause and did deliver the said bonds from 51 to 110, inclusive, back to the party of the first part, which is the Greensboro Water Supply Company? A. In accordance with the deed of trust.

10 Q. Were they delivered duly certified by your com-
(96) pany as trustee? A. Yes, sir.

11 Q. Can you state, Mr. Merryman, whether you are aware that any committe, acting for the holders of the Greensboro Water Supply Company, has collected and did deposit with your company any bonds of the Greensboro Water Supply Company, and, if so, just what bonds and what numbers have been deposited with your company, and what description; whether you issued a receipt therefor, and produce a copy of that receipt, if you have it. The Greensboro Water Supply Company I call your attention to now? A. Yes, sir, there has been deposited with us on the part of the various holders of those bonds, bonds to the amount of $59,000.

12 Q. Have you those bonds present, Mr. Merryman, and as you have said there were fifty-nine of them, which is one less than the sixty that you said your company certified and delivered back to the Greensboro Water Supply Company, can you tell us what number of bond is missing? A. Bond No. 92 of the denomination of $1,000.

13 Q. Please look at the bonds Series A. of the Greensboro Water Supply Company and by the date of the memorandum you have, tell us what numbers of bonds have been deposited with you, and what, if any, are missing of the thirty bonds, Series A, that there ought to be in that list? A. There are none missing of Series A; we have from 51 to 80, inclusive.

NOTE.—Here the witness presents to the court the bonds Series A, numbered from 51 to 80, inclusive, which, being examined by counsel for creditors, and by the referee, are found to be the bonds of the Greensboro Water Supply Company, Series A, and numbered as aforesaid.

14 Q. (Mr. Taylor) What form of receipt did you issue to the owners depositing those bonds? A. I have a

copy of the receipt which I now file marked "Plaintiff's Exhibit H. C. M., No. 1."

Mr. BROOKS: I do not desire at this time to interfere, but I do not know as to the regular issuance of those (97) bonds, and I, of course, object to their introduction; I desire to reserve the right.

The MASTER: The counsel for the creditors reserve any right to object to the said bonds.

15 Q. How many bonds of Series B were deposited with your company for the owners? A. Twenty nine.

16 Q. What denomination of bonds? A. A thousand dollars.

17 Q. What numbers? A. 81 to 91, inclusive, 93 to 110, inclusive.

18 Q. Then, if I understand you right, No. 92 of that issue of Series B bonds has not been deposited with your company? A. It has not.

19 Q. The list that you hold in your hand contains a complete list of the numbers of both Series A and Series B bonds deposited with your company, does it? A. Yes, sir.

20 Q. Well, you will file that and mark it, please? A. Yes, sir.

Note.—The paper referred to is herewith filed marked "Complainant's Exhibit H. C. M., No. 2."

21 Q. What form of receipt did you issue for the Series B bonds thus deposited with you?

WITNESS: Series B bonds?

Mr. TAYLOR: Yes, sir? A. The same form.

22 Q. As the one marked "Exhibit H. C. M. No. 1?" A. Yes, sir.

23 Q. Will you state, Mr. Merryman, whether your company has also acted as depository of any of the first mortgage bonds of the Greensboro Water Company, secured by a mortgage from the Greensboro Water Company to the Guarantee Trust and Safe Deposit Company, a corporation existing under laws of the State of Pennsylvania, a copy of which mortgage marked "Plaintiff's Exhibit C," heretofore proven proven in this case, I now show you, (98) and I call your attention to the copy of the bond in the mortgage on the third page, and, with that before you, ask you if you can identify any deposit of bonds as being thus secured by that mortgage?

Mr. BROOKS: To that question we object generally.

A. Our company is the depository of the first mortgage six per cent. bonds of the Greensboro Water Company.

24 Q. Under what terms have you issued a receipt describing the terms of that deposit with you? A. We have issued such receipt, a copy of which I now hand you and file with the master marked "Complainant's Exhibit H. C. M., No. 3."

25 Q. That receipt, as I understand, sets out the terms upon which those bonds were left with your company by the owners? A. It does.

26 Q. How many of these bonds have been so deposited, Mr. Merryman? A. Thirty-eight.

Note.—The witness here presents to the court the 1st mortgage bonds numbered as per list marked Exhibit H. C. M., No. 4. Which being examined by counsel for creditors, and by the referee, are found to be the bonds of the Greensboro Water Company, numbered as aforesaid.

Mr. BROOKS: Note that the counsel for the creditors enters an objection to the admission of the bonds.

27 Q. Have you made a list of the numbers? A. We have.

28 Q. Will you look at that list, and, if correct, file it with the master as an exhibit? A. Yes, sir; that is a correct list of the number deposited.

29 Q. And of the numbers of the bonds deposited with you? A. Of the numbers of the bonds deposited with us, yes sir.

Note.—The paper referred to is herewith filed marked "Complainant's Exhibit H. C. M. No. 4."

The MASTER: I understood you to answer the question and submit these bonds here, or that deed of trust, and the (99) witness's answer was that the Guardian Trust Company was depository of certain bonds of the Greensboro Water Company, the first issue? A. Yes, sir; of thirty-eight up to the present time.

30 Q. Then, of those bonds, you are the present depository of thirty-eight? A. Yes, sir.

31 Q. Mr. TAYLOR: Out of the fifty called for by that mortgage, there are twelve of those bonds which you have not yet received? A. Yes, sir.

32 Q. And issued any receipt for? A. Yes, sir.

33 Q. Such as you have filed here as H. C. M. No. 3, or any receipt at all? A. That is correct.

34 Q. Please look at the original, copy of which has

Water Supply Company? A. Well, sir, they have been entrusted to the Guardian Trust and Deposit Company.

Q. For what purpose? A. For the purpose of concentrating them all in the hands of one person or one corporation, as per that agreement there, marked "Plaintiff's Exhibit H. C. M. No. 1."

(113) Q. And has the payment of interest upon all of the outstanding bonds for which this company is liable been made through your house by the Greensboro Water Supply Company? A. The interest was remitted to the Guardian.

Q. Was it through your house? A. Not that I know of; not that I remember.

Q. The reason I ask you, Mr. Glenn said that some of it went through your house? A. Well, if it went through our house, it went through in the form of a check for that purpose, and would be immediately handed over to the Guardian; our books would not show. Mr. Glenn may have remitted to the Guardian, and sometimes to us; if he has remitted to us, we endorsed it over to the Guardian, and it was applied to the purpose of paying the interest on the debt.

Q. Who has had the management of the Greensboro Water Supply Company since its organization? A. Mr. Glenn, I believe.

Q. By whom was he *was* elected? A. By the Greensboro Water Supply Company.

RE-DIRECT EXAMINATION.

Q. Mr. TAYLOR: You have been asked by the counsel about the fifty thousand dollars of bonds of Series A of the Greensboro Water Supply Company. I call your attention to the mortgage in the first and second clauses, after the phrase, "in trust and confidence, nevertheless," to the fact that there are eighty bonds of Series A out of eighty bonds of that series under the terms of that deed of trust, that came by the deed to the Guardian Trust and Deposit Company, in trust, to pay and retire fifty first mortgage bonds of the Greensboro Water Company, and I asked you if you intended to speak, by your answer to the question to which I have referred, in reference to those fifty bonds? A. Oh, no.

Q. The first bonds, numbered 1 to 50? A. No, they were made for the purpose of retiring the fifty, as they matured; the prior mortgage.

(114) Q. Well, have they ever been issued within your knowledge? A. No, they have never been issued.

Q. Were they, within your knowledge, deposited with the trustee, according to the terms of the deed of trust,

and do they still remain there? A. They were, and still remain there.

Q. That would leave thirty bonds of Series A, from No. 51 to No. 80, inclusive? A. That is right.

Q. Was your answer in reference to those thirty bonds? A. My answer was in reference to those thirty bonds instead of the fifty.

Q. How many of Series B bonds were there issued and are outstanding under that deed of trust, according to your knowledge? A. Fifteen of each, I think.

Q. Look at the deed of trust. A. I have not read the deed of trust for many years, and I don't remember it; that speaks of all the bonds from 1 to 50 of Series A for the purpose of paying off the first.

Q. Well, I want you to read about all the bonds there, and answer in regard to all of them? A. (After reading) There were sixty thousand dollars of them; thirty thousand provided for as the first series, or thirty thousand dollars of each.

Q. Of what series? A. Thirty thousand dollars of A, and thirty thousand dollars of B.

Q. Are those thirty Series A, and thirty Series B outstanding, and issued by the company, according to your knowledge, or not? A. They are.

Q. Are those the bonds to which you referred in your answer to the counsel's question? A. They were.

(115) RE-CROSS EXAMINATION.

Q. Mr. BROOKS: What interest have you been receiving from the Greensboro Water Supply Company upon the bonds of the Greensboro Water Company? A. Six per cent.

Q. Do you, as holder of the bonds of the Greensboro Water Company, have knowledge, or did you, as holder of the bonds of the Greensboro Water Company, have knowledge of the sale and the plans of the Greensboro Water Company to purchase and reorganize under the name of the Greensboro Water Supply Company, and of its subsequent operations under the said name? A. Well, at the time the operation was performed, I was out of the country, and I knew nothing about it until I returned; I was not present at the time.

Q. When did you return? A. That I cannot tell you.

Q. About when? A. I was backward and forwards so often, that really I cannot say.

Q. How long have you had knowledge of such facts?

WITNESS: What facts?

Mr. BROOKS: The fact that it had been sold out? A. Since 1896.

Q. Do you know who is the next largest holder, after yourself, of the bonds of the Greensboro Water Company? A. Well, there are several other larger holders than myself.

Q. Can you give me the names of them? A. Well, I propose to furnish you the list.

Q. I thought you might remember them off-hand? A. I cannot remember now, no, sir.

Q. Are any of the present directors, officers or parties interested in the Greensboro Water Supply Company holders, other than yourself, of the bonds of the Greensboro Water Company? A. Yes, sir; there are.

(116) Q. Will you please give me their names? A. I will later, I cannot do it now.

Q. In your list, will you please designate, in giving me the names, those persons interested in the Greensboro Water Supply Company, with the amount of bonds so held, opposite that name? A. I canot give you a list of all the bondholders of the Greensboro Water Supply Company.

Q. I do not mean that; I mean, giving the list of the bondholders of the Greensboro Water Company, those of them who are officers or interested in the Greensboro Water Supply Company? A. I will if I can; I don't know whether I can or not.

(Now, at this point, the witness retired to secure the list, and during the examination of Mr. Taylor, the next witness, he returned with the list referred to, asked for by counsel, the same being filed marked "Complainant's Exhibit J. S. G. No. 1," and the counsel, Mr. Brooks, waives any further cross examination of the witness.)

WITNESS: I am under the impression that I testified, in the early part of my testimony, that the firm of John S. Gittings and Company were, at present, holders of the six per cent. Greensboro Water bonds; I find, upon going over the list, that we are not such holders, and, if I did so testify, I want to correct it, and I now correct it; and we are holders of the Greensboro Water Supply Campany bonds, but I do not know how many.

JOHN S. GITTINGS.

ARCHIBALD H. TAYLOR, a witness called and sworn for the complainant, testified as follows.

DIRECT EXAMINATION.

1 Q. Mr. KEECH: Will you state your residence and occupation? A. 1424 Park avenue, Baltimore; lawyer.

2 Q Have you, at any time, been connected with the (117) legal affairs of the Greensboro Water Supply Company? A. Yes, sir; I have acted as counsel, one of them, during its whole history, I believe.

3 Q. Were you connected in any way with the organization of the Greensboro Water Supply Company? A. I was, sir; I became a director in it during the first year of its existence and I was counsel for the company and for the holders of the securities of the original company, the Greensboro Water Company, who caused the property to be purchased and reorganized it as the Greensboro Water Supply Company.

Mr. BROOKS: We object to that answer.

4 Q. Will you state in succinct form what were the steps taken in the organization of the Greensboro Water Supply Company, and how it was done?

Mr. BROOKS: We object to that upon the ground that the proceedings in the United States Court are the best evidence of that and the only evidence, as it was sold under order of court.

The MASTER: Just go on.

A. The Greensboro Water Supply Company was organized by Hugh L. Pope, who was the purchaser of the property and franchises of the original Greensboro Water Company at the sale in the United States Court by the commissioners, who were Mr. R. R. King and myself. After the Greensboro Water Supply Company was thus organized, I superintended the action of the company in the issue of its new securities, its bonds and the deed of trust to secure the same, and, I also, as director, assisted it on that occasion in the administration of affairs by which those securities, when issued, were disposed of.

5 Q. Will you, then, go on Mr. Taylor, and give a statement as to the issue of those securities, and what disposition was made of them? A. The mortgage of the Greensboro Water Supply Company to the Guardian Trust and Deposit Company, which has been put in evidence, and is referred to here as Plaintiff's Exhibit "G," was drawn (118) by myself and executed by the officers of the company under my supervision, and I took part as one of the directors of the company and its chief directing legal officer, perhaps I might call myself, in the distribution of

the securities under it. Do you wish that I should state how and to whom they were distributed.

6 Q. If you please; I think that is a part of the question? A. Of the 80 Series "A" bonds called for by that mortgage, 50 were left, under the terms of the mortgage, with the trustee to be used by it, as it might find the opportunity, in paying off and retiring the first mortgage bonds of the Greensboro Water Company. I should state here that the mortgage made by the Greensboro Water Supply Company only purported to be a lien on the property and franchises originally those of the Greensboro Water Company, subject to the 50 mortgage bonds of the Greensboro Water Company, which were then all outstanding and had been in the hands of holders other than the company itself, for a number of years, within my knowledge; ever since 1888, in fact, because I had become connected with the Greensboro Water Company at that early day; those first mortgage bonds were then outstanding, and I happened to know it because I held some stock in the original Greensboro Water Company.

Mr. Brooks: I desire to note an objection to that answer.

7 Q. Were the 50 bonds of the Greensboro Water Supply Company to which you have referred in your answer, used for the purpose for which they were made? A. No, the Guardian Trust Company has them and has, of course, never been able to use them, as the holders of those original bonds would not exchange them for these bonds of the new company, and the bonds of the new company could never be sold, as yet at their par value, so as to enable them to purchase in those original bonds of the Greensboro Water Company.

8 Q. Will you kindly go on and state further concerning the other bonds of Series "A" and the Series "B" bonds? A. Of the 30 additional Series "A" bonds, Nos. 51 to 80, inclusive, 20 were issued immediately, or soon after the exe-
(119) cution of this mortgage in payment of cash claims, which took precedence of all the securities of the original Greensboro Water Company, and which cash had to be provided under the terms of the reorganization. These terms were, as agreed upon by the holders of the securities of the original Greensboro Water Company, that the holders of these last named securities should receive securities of the new company, bonds and stock, but subject to a lien to provide the cash to pay off the receiver's certificates, some $15,000, upon which money had been borrowed by the receiver, and the additional cash advances to buy up the claims against

the Greensboro Water Company which were prior to the securities of the Greensboro Water Supply Company, such claims for material and construction, and that sort of thing, which were due by the Greensboro Water Company at the time it went into the receivership. These had to be bought up and disposed of, and the people who had advanced the cash for them received some of these twenty Series "A" bonds, or the proceeds of them. The whole of the 20 Series "A" bonds were then immediately distributed for cash which had been advanced by these parties, namely, those who furnished the money on the receiver's certificates, and those who had furnished the money to buy up claims which the Greensboro Water Company owed, and which came ahead of these bonds, the second mortgage bonds, at least.

Mr. BROOKS: Note an objection to all of that answer.

A. (Resuming) Then the 30 Series "B" were immediately issued, and we issued 20 of them to the holders of the original 20 second mortgage bonds of the Greensboro Water Company, which was in accordance with the agreement made with those holders prior to the purchase and reorganization of the company.

9 Q. (The MASTER) There was, then, a second mortgage on the Greensboro Water Company? A. There was a second mortgage of the Greensboro Water Company, 20 bonds of a thousand dollars each. Those 20 Series "B" (120) bonds were exchanged bond for bond with the holders of the original 20 second mortgage bonds of the Greensboro Water Company. Ten Series "B" bonds were issued for money, additional money, which was still needed to pay for some of the cash indebtedness, either of the receivership or of the original Greensboro Water Company. For instance, three of these bonds, Series "B," were given to myself as part satisfaction for my bill of services rendered to the receiver, and rendered the original Greensboro Water Company, and also rendered the reorganization of the company, as, for instance, the draft of the mortgage to which I have just referred. Three were given to Mr. R. R. King, who shared in those labors; one of them was given to General Jas. D. Glenn, who claimed additional compensation over and above the $60 per month which he had drawn as receiver, and which he claimed was only his partial compensation. Mr. King and myself were, of course, aware that we could have preferred a claim to the United States Court, in which the receivership proceedings were pending, to have our services rendered to the receiver, and to the parties in interest in that cause, assessed, and a sum allowed us for which we would doubtless have had a

first lien, but we made an agreement with the holders of the securities who were about to reorganize the company after purchase, as it actually took place, that we would, instead of demanding compensation in that way, take compensation from the new company to be organized by the purchaser at that sale. The other three of those ten bonds were sold for still additional cash that was needed, as I have said, to pay off old claims against the Greensboro Water Company, or against the receivership; there were, according to my recollection, and I am quite sure on the subject, for I participated in all the official actions of the company and in the things as they actually took place, these 50 bonds, 20 Series "A," and 30 Series "B," were then issued for value by the Greensboro Water Supply Company, and have been since then outstanding and unpaid, and the interest upon the coupons has also been paid. At a late stage, quite a late stage, not long before the institution of the present proceedings of the present receiv-
(121) ership, the ten Series "A" bonds, the balance left in the treasury of the company, were delivered to some gentlemen, four of us, who undertook to purchase what is known as the Gorrell judgment, and hold it and carry it according to the company's convenience. We requested to have these bonds given to us as collateral for advancing our money to make that purchase, because the status of the judgment was not known and we were unwillin g to make the purchase of the judgment, and carry it along without interfering with the company, unless we had as additional security for the judgment, these 10 Series "A" bonds. Of course, when that judgment is paid to us, we expect to return or account for those bonds to the company's treasurer. The Guardian Trust and Deposit Company acted as our agent or trustee in making that purchase and actually advanced the money for it, and they received these 10 Series "A" bonds as additional collateral for their advance, just as we held them. That accounts, I think, for all the securities of the company that were issued within my knowledge during my connection with it, and I think states nearly as exactly as possible the terms upon which those issues were made.

Mr. Brooks: I desire to note a general objection to the entire answer there.

10 Q. Mr. Taylor, you spoke of the exchange of the securities of the new company for the $20,000 of second mortgage bonds of the original. Was that arrangement, or was the arrangement for such exchange made before or after the sale of the property? A. It was really made prior

to the sale. The holders of all of the securities of the old company said we will purchase or agree—I was one of them to a small extent—agree to bid for the property through our agent, Mr. H. L. Pope, and to deliver to him all of the securities of the old company, so that he could, if necessary, bid up to the full amount of the stock and bonded debt of the old company, without paying cash, but as I have said, there was a certain amount of cash which had to be paid before the holders of the securities of the old company could use them in payment for the property, (122) and the understanding was that that cash, which was advanced by various parties, should be repaid in bonds of the new company of a prior lien to those given to the holders of the original securities of the Greensboro Water Company. That was the general plan of the organization, of course, there was a general understanding about it prior to the sale itself. It was carried out after the sale as nearly as possible.

11 Q. In other words, if it had not been for the understanding under which these securities that were deposited with Mr. Pope, and the understanding with respect to the of new securities in their place, in the absence of a bidder who was willing to bid more than Mr. Pope could bid on them, the sale of these securities and bonds would never have been so settled? A. No, Mr. Pope, as you see, possessing $20,000 second mortgage bonds of the old company and $75,000, of its stock, could have bid up to that aggregate of money without laying down any cash at all, and could have bid against any other bidder, because he would have been entitled, out of the proceeds of sale, to advance upon his securities, except so far, as I say, there was cash claims which came in against the receivership, which came in prior to these old securities; he did actually bid the nominal sum of $37,500, according to my best recollection, but could have just as well have bid $95,000 or $100,000, without laying down any more cash.

12 Q. Mr. Taylor, will you look at the two certificates, which have been heretofore filed as Complainant's Exhibit H. C. M. No. 1 and No. 3, and state whether or not you had anything to do or acted in any connection with the deposits of bonds made under or in accordance with the terms of such certificates or receipts? A. I did.

13 Q. Will you state what that connection was? A. I was a holder of some of those bonds, or rather represented the holders on that date, because I had sold all my Greensboro Water Supply Company bonds, and in conference with (123) other bondholders of the bonds of the Greensboro Water Supply Company we had agreed that when the

company was put into the receiver's hands, as seemed necessary and probable, we would assent to the sale of the property of the company to the City of Greensboro, first for the sum of $87,500, which was offered to us, and finally, even for the sum of $75,000, when that offer was withdrawn and the other offer made. In consultation with the holders of these outstanding bonds of the Greensboro Water Supply Company, I was authorized to have the Guardian Trust Company file its bill for a receiver in that suit, and did mainly, I think, draft the bill and cause it to be filed, acting under authority from nearly all, if not all, of the Greensboro Water Supply Company bondholders or persons who represented them. I filed the assent, in the course of the proceedings, to the sale of the property to the City of Greensboro for the sum of $75,000, and made the representation to the City of Greensboro that we would be able to make that offer or assent good, because we would confer as soon as possible with the holders of the first mortgage bonds of the Greensboro Water Company, which were not over due, and upon which no interest was in default, and get them to consent to take their money, thus enabling the sale to be carried out. We were not then in communication with the holders of those first mortgage bonds of the Greensboro Water Company, and had to ascertain who they were by requiring the people who presented the coupons for payment at the time of the payment of interest, the semi-annual interest, which was, I think, the first of February, to say for whom they presented those coupons, and who they understood to be the owners of the bonds. In that way, as Mr Gittings has already testified, we located the owners of those bonds, and got them to sign the preliminary agreement to deposit all their bonds with some depository, and to receive the payment of them from the said depository, if the terms of this sale should be ratified or ordered by the court. It was in pursuance of that agreement that the deposit of the 38 bonds was (124) made with the Guardian Trust and Deposit Company, which has been shown here in evidence, but the holder of some ten of those bonds represented by W. C. Seddon, a banker here, refused to deposit his bonds with the Guardian Company, but deposited them with Mr. Seddon, subject to the same terms, as we understood from Mr. Seddon, definitely, that he was willing to accept his money just as the Guardian Company is authorized to accept it, or those who deposited with them. The bonds of the Greensboro Water Supply Company, Series "A" and "B," were deposited with the Guardian Company, as their own receipt shows, so that they could be actually filed in court,

and receive the dividends to which they might be found to be entitled, after the payment of the first mortgage bonds to the holders thereof. Those Greensboro Water Supply Company bondholders were, of course, aware that they held a lien upon the property of the Greensboro Water Supply Company, subject to the lien of the first mortgage bonds of the Greensboro Water Company, for the mortgage conveyed only such property and rights as the Greensboro Water Supply Company possessed, and it only possessed that property or franchises and rights subject to the lien of the first mortgage bondholders of the Greensboro Water Company, for its deed for this property is in those terms. I had a large part in inducing the bondholders, both of the Greensboro Water Company and the Greensboro Water Supply Company, to make their respective deposits, and I deposited for my brother, Julian Taylor, who is the owner of the bond No. 20 of the Greensboro Water Company first mortgage bonds, and received the receipt of the Guardian Trust and Deposit Company for that bond in the form H. C. M. No. 3, which has been mentioned there. I think it is proper to add here that my brother purchased this bond, so deposited, two or three years ago, upon the Baltimore Stock Exchange, and sent me the money to pay for it for him. I also deposited myself, in person, bonds Nos. 85, 86, 87 and 93 of the Greensboro Water Supply Company Series "B," and I received the receipt in the form H. C. M. No. 1, which has been mentioned here. These bonds at the time of the deposit belonged, one to my brother, Julian Taylor, one to Mrs. Fannie C. Pulmer, one to Miss Annie C. Grinnan, and one to Charlotte C. Berryman; they were the bonds which I had originally held myself and sold for value to those parties named, several years ago, probably three years ago.

(125) 14 Q. Mr. BROOKS: Were they Greensboro Water Supply Company bonds? A. These later ones, yes, sir.

15 Q Mr. KEECH: Were you or not instrumental in procuring other purchasers to so deposit their bonds? A. I think I so stated; I had interviews with a number of the holders of the bonds, both of the Greensboro Water Company and the Greensboro Water Supply Company, and told them that it was the only thing left to do, and it would be to their advantage to do it.

16 Q. Mr. Taylor, I want to call your attention to the list of bonds filed here and marked T. S. G., No. 1, and ask you to state whether or not you know, of your own knowledge, of the holdings of any of these persons of the bonds named there, other than that of your brother, Julian Taylor, about whose holdings you have already testified?

Mr. BROOKS: Objected to.

A. Well, I know many of the people on this list; I know from interviews with them on the subject of the deposit of the bonds, just as I have mentioned, that they held them, but just what numbers they held I was not informed, and am not informed any further than by this list which I believe to be correct.

17 Q. Mr. Taylor, can you state whether or not the $50,000 of bonds of the Greensboro Water Company are outstanding and unpaid obligations of that concern?

Mr. BROOKS: Objected to.

A. I know they are, and have been ever since my first acquaintance with the company. When the company was first placed in the receiver's hands on the suit of the second mortgage bondholders, the original Greensboro Water Company, these 50 first mortgage bonds were outstanding, (126) and I took part in the deliberations and actions of the receiver managing the company, in seeing that the interest was always provided to meet them; he was short of money at times, and had to raise money, the best way he could, always to pay punctually that interest.

17 Q. You refer now to the first receivership? A. Yes, sir; to the first receivership. Ever since then I know, from my intimate connection with the company, that no dollar of the company's assets has been paid out to purchase in or retire those bonds, and no one has paid out any money on account of the company to purchase and retire them. The Guardian Trust Company was the only person in any position to do this, and it could only do it from the 50 Series "A" bonds of the Greensboro Water Supply Company, by their sale, and I know they are still with the Guardian Trust Company in trust, and not negotiated.

18 Q. Now, Mr. Taylor, can you state whether the 60 bonds of the Greensboro Water Supply Company, being 30 bonds of the Series "A," and of the Series "B," the bonds of the said company, are still out standing and subsisting obligations of that concern? A. They are all oustanding now, but, as I told you, or as I thought I made it plain, 50 of them, namely, 20 Series "A" and 30 Series "B," were the number that were outstanding until some five or six months ago; ten Series "A" were delivered as collateral to the parties who purchased the Gorrell judgment, and they have been outstanding only since that date, and only in the manner that I have described.

Mr. BROOKS: To the answers of the witness in his direct examination I desire to object.

CROSS EXAMINATION.

1 X-Q. Mr. BROOKS: Mr. Taylor, what disposition was made of the bonds issued, or the proceeds arising therefrom, of the Greensboro Water Supply Company of the thirty Series "A" and the twenty Series "B" other than the payment of the $20,000 for cash advanced, and expenses incurred by the receiver of the Greensboro Water (127) Company? A. I thought I had stated that the proceeds of twenty Series A bonds, and the proceeds of the ten Series B bonds were used for cash to pay claims against the receivership and against the original Greensboro Water Company that were bound to be paid before the Greensboro Water Supply Company could have gotten its clear title.

2 X-Q. I understand, that was twenty; that is why I asked the question? A. That accounts, you see, for thirty, the other twenty were given in payment of the original second mortgage bonds of the Greensboro Water Company, bond for bond, in accordance with the original agreement made when the plan of sale and reorganization of the company was determined upon.

The MASTER: You mean the other twenty B's? A. Yes, sir; the other twenty of Series B.

3 X-Q. Mr. BROOKS: Who were the other purchasers, besides yourself, of the Gorrell judgment? A. Mr. John S. Gittings, Mr. W. C. Seddon and Mr. Wm. A. Bosley.

4 X-Q. State whether or not all of the purchasers of said judgment are stockholders in the Greensboro Water Supply Company? A. Well, I am, and the others must have been, but to what extent I do not know.

5 X-Q. Do I understand you to say that the sale of the Greensboro Water Company and of the organization under the name of the Greensboro Water Supply Company was had and made in pursuance of an agreement of the parties interested in the Greensboro Water Company prior to the sale of said plant? A. Yes, sir, the parties interested in the Greensboro Water Company and the parties who had cash claims against the receivership and claims against the Greensboro Water Company other than its stocks and bonds.

6 X-Q. State if the stockholders and managers of the (128) Greensboro Water Supply Company are not in the main those interested in the Greensboro Water Company? A. If you mean those who were interested in the Greensboro Water Company prior to its reorganization, I don't know that, and I don't think that they are; certainly, the stock is not held in anything like the same proportion, according to my recollection, or never was so held.

7 X-Q. State whether or not Mr. George B. Wood is interested in the Greensboro Water Supply Company other than as a holder of the bonds? A. No, he is not, and if I had understood your question to refer to the list of those bondholders of the Greensboro Water Company furnished by Mr. Gittings, I could have answered that there is not a single name upon the list that, according to my knowledge, at any time ever held any stock of the Greensboro Water Supply Company, except the name of John S. Gittings; Mr. Gittings held some stock in the Greensboro Water Supply Company, but I do not know how much or what.

8 X-Q. Do I understand you to say, that at the time and prior to the sale of the Greensboro Water Company, that you were the legal adviser of the Greensboro Water Company, and conferred with the bondholders of said company? A. I was, I said, the legal adviser of the second mortgage bondholders, and certainly conferred with all of them. The first mortgage bondholders were a considerably scattered group, just as they are now, and I cannot say what, if any, of them I conferred with, and I did not represent those first mortgage bondholders.

9 X-Q. State whether or not, prior to the sale and the reorganization of the Greensboro Water Supply Company, you had any conference with the trustee in the deed of trust made by the Greensboro Water Company, to-wit: the Guarantee Trust and Deposit Company of Philadelphia? A. No, I had not.

10 X-Q. State whether or not Hugh L. Pope is interested in the Greensboro Water Supply Co., and if so, in (129) what capacity? A. Hugh L. Pope was depositary and agent of all the security holders of the Greensboro Water Company who desired and planned the reorganization, and he purchased the property and reorganized it as purchaser in the manner I have described. Exacly what interest of his own he had, I cannot state, but he had some.

11 X-Q. But do I understand that he is interested in the Greensboro Water Supply Company?

WITNESS: At present?

Mr. BROOKS: Yes, sir. A. He is stockholder, the principal.

12 X-Q. Did he, in your reorganization, represent the first mortgage bondholders of the Greensboro Water Company? A. He did not.

13 X-Q. What interest, then, did he represent, if you represented the second mortgage bondholders? A. He represented the second mortgage bondholders and the stockholders, and the parties who had advanced cash to the receivership, and held other claims against the Greensboro

Water Company, and the first mortgage bonds, and my representation was of a very different capacity. I acted as their legal adviser, and Mr. Pope as their agent and attorney in fact and associate.

14 X-Q. Do you know that he did not represent either the Guarantee Trust and Deposit Company, Philadelphia, trustee, or the first mortgage bondholders? A. I do know it, just as positively as a man can know a negative or prove it. The first mortgage bondholders were never consulted with, or affected by that proceeding. Their interest was always kept paid up, and it was considered that they had no interest in the proceedings, as we only sold and took subject to their rights.

15 X-Q. I understand you to say that the books of the Greensboro Water Supply Company have not been sent here? A. I said so to you in conversation to-day, and that is true. General Glenn is mistaken in thinking that he (130) dispatched those books to me; he sent me some papers belonging to the company, which I think are simply and solely copies of certain proceedings during the time of his receivership; at least, that is the result of my examination of them.

I desire to say before signing that, on reflection, I think the Series B bond No. 85, belonging to my brother, Julian Taylor, was obtained by him from me, less than three years ago, when Nos. 86, 87 and 83, Series B, were sold by me to the other parties named.

ARCHIBALD H. TAYLOR.

By consent of all parties, the further hearing of this matter was adjourned to be heard at the office of King & Kimball, Greensboro, N. C., on the 9th day of May, 1901, at 12 o'clock, noon.

Pursuant to the last adjournment, the case was called up by the master, at the office of King & Kimball, Greensboro, N. C., May 9th, 1901, at 12 o'clock, noon. Present: Messrs. A. B. Kimball, C. B. Brooks, Jno N. Wilson, A. M. Scales, R. R. King, L. M. Scott and W. P. Bynum, Jr.

No testimony was offered by any party at the hearing.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

EXHIBIT NO. A, REPORT OF RECEIVER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(131) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.

To the Honorable Judge presiding in the United States Court above named:

Your receiver would respectfully report that, in pursuance of an order heretofore made in the above entitled cause, he assumed control and possession of the plant of Greensboro Water Supply Company, including, among other things, its real estate, pump and pumping house, together with all machinery, pipes and other property and effects of said defendant company on the 1st of October, 1900.

That, in pursuance of said order, your receiver has been continuously operating this plant, supplying water to the City of Greensboro and other persons as theretofore said company had been doing.

That your receiver has collected on account of water furnished prior to January 1st, 1901, $5,577.68, and the further sum of $24.57 interest on account of warrants issued by the City of Greensboro, making a total collected on the business previous to the present year of $5,602.25. There is a balance of $392.17 due on accounts maturing prior to January 1, 1901. Of these, it is uncertain what can be collected.

That your receiver has collected on account of water furnished since December 31st, last, $2,150.09, This sum covers collections for last and current quarter, and leave the sum of $ yet uncollected on account of the quarter ending March 31st.

That your receiver has disbursed on account of expen-
(132) ses to January, 1901, $1,246.60, and on account of expenses *to* since January 1st, 1901, $2,425.13, leaving a balance now in the hands of your receiver of $4,080.61. The items of expense may be seen by reference to the exhibits hereto attached.

By reference to my bank account, it will be seen that on January 24, 1901, I drew a check to the Guardian Trust & Deposit Company, of Baltimore, Md., for $1,500.00, and that on February 9, 1901, I made a deposit of $1,500.00,

the deposit being the same check last above referred to. This arose as follows:

There was due $1,500 on account of interest on $50,000 first mortgage bonds of the Greensboro Water Company, which bonded indebtedness had theretofore been assumed by the present company. Your receiver had in hand a warrant of the City of Greensboro for $1,437.50, which, by resolution of the company, was especially appropriated to the payment of this interest account. This warrant, together with your receiver's check for $62.50, was forwarded to the said trust company to meet this interest, but, as there was some doubt as to whether the city would meet and pay this warrant, your receiver, as a precautionary measure, drew the check for $1,500.00 and forwarded that at the same time. The city having met its warrant, the $1,500.00 check was returned unused, and was redeposited, making your receiver's bank account apparently show an out-go of $1,500, and in income of $1,500 in excess of the real amount received and disbursed.

Prior to the time your receiver assumed control, the defendant company had borrowed of the Greensboro National Bank $910.00, and, to secure same, had hypothecated with said bank a city warrant for that amount, which the said bank collected and applied.

Appended is a statement of claims due by defendant company at and prior to the appointment of your receiver, and same have been filed with him, outside of its bonded indebtedness.

Greensboro, N. C., April 11th, 1901.

R. R. KING, Receiver.

Itemized Statement of Expenses from Oct. 1st to Jan. 1st, 1901.

(133)

	LABOR.		
J. E. Jenkins, Engineer,	Oct. 13,		$32 00
" " "	" 27,		32 00
" " "	Nov. 10,		32 00
" " "	" 24,		32 00
" " "	Dec. 8,		32 00
" " "	" 22,		32 00
" " "	" 31,		20 57
L. A. Wyrick,	Nov. 1,		40 00
" "	Dec. 4,		40 00
" "	Jan. 5,		40 00
Pay-Roll,	Octo. 6,	1900,	8 75
"	" 13,		3 87
"	" 20,		6 50
"	" 27,		3 50
"	Nov. 3,		3 50
"	" 10,		3 50
"	" 17,		3 50
"	" 24,		3 50
"	Dec. 1,		5 00
"	" 8,		3 50
"	" 15,		3 50
"	" 22,		3 50
"	" 29,		3 50
Jas, D. Glenn,			225 00
			613 19
	FUEL ACCOUNT.		
So. Ry. Co.,	Oct. 19,		60 37
Greensboro Ice & Coal Co.,	Nov. 5,		111 78
N. F. White,	" 21,		2 00
Greensboro Ice & Coal Co.,	Dec. 20,		231 57
N. F. White,	" 22,		2 00
Greensboro Ice & Coal Co.,	Jan. 4,		27 57
" " "	" 29,		118 12
			$553 41
	MISCELLANEOUS.		
Dr. Albert Anderson,			20 00
Albright & Beatty,			5 00
Matthews & Cranford,			1 50
Guilford Lumber Mfg. Co.,			1 25
Matthews & Cranford,			2 25
J. H. Gilmer, sheriff,			50 00
			$ 80 00
Total,			1,246 60

Items of Expense Since January 1st, 1901.

(134) LABOR.

J. E. Jenkins, Engineer,	Jan. 5, 1901,	11 43
" " "	" 19, "	32 00
" " "	Feb. 2, "	32 00
" " "	" 16, "	32 00
" " "	Mch. 2, "	32 00
" " "	" 16, "	32 00
" " "	" 30, "	32 00
L. A. Wyrick,	Feb. 20, (for Jany.)	40 00
" "	Mch. 16,	40 00
" "	Apr. 2,	40 00
Pay-Roll,	Jan. 5,	3 50
"	" 12,	3 50
"	" 19,	3 50
"	" 26,	3 50
"	Feb. 2,	3 50
"	" 9,	3 50
"	" 18,	3 50
"	" 23,	3 50
"	Mch. 2,	3 50
"	" 9,	3 50
"	" 16,	11 65
"	" 26,	8 00
"	" 30,	6 50
"	April 6,	5 00
		$389 58

FUEL ACCOUNT.

Greensboro Ice & Coal Co.,	Jan. 9,	109 52
N. F. White,		2 00
Greensboro Ice & Coal Co.,		181 77
Jno. W. Wharton,		2 00
Greensboro Ice & Coal Co.,		151 85
J. E. Jenkins,		4 00
		$451 14

MISCELLANEOUS.

Matthews & Cranford,	3 00
Dean Steam Pump Co., & freight,	4 32
Standard Oil Co.,	4 00
J. J. Stone,	3 00
Standard Oil Co.,	5 60
Greensboro Telephone Exchange,	13 14
Matthews & Cranford,	3 00
E. M. Caldcleugh & Bro.,	65
Odell Hardware Co.,	9 86
J. R. Richardson,	1 00
Court costs, telegrams, etc.,	30 75
Albright & Beatty,	3 99
Check book,	2 10
	$ 84 41
(135) Total.	925 13
Interest on first mortgage bonds,	1,500 00
	2,425 13

Arrears, April 10th, 1901,

For Water Rent Due December 31, 1900.

City of Greensboro (for Market House),		$ 55 00	Promise to pay.
City of Greensboro (Graded School),		125 00	
Mrs. J. W. Paynes,	City,	7 50	By Jan. 20th.
Hon. D. Schenck,	"	10 00	
Thomas Bernard,	Chattanooga, Tenn.,	3 00	
J. Henry Phipps,	City,	4 25	
Sam Browne,	"	3 00	Charge to Boycott.
Mess. King & Kimball, estate of D. W. C. Benbow,		56 00	
A. & M. College,	City,	32 92	By April 1st.
John L. King,	"	14 00	See Mr. R. R. King.
W. F. Bogart,	"	22 50	Before Feb. 1st.
W. P. Bynum,	"	5 00	
John Weatherly,	"	3 00	
L. W Clark,	Spray, N. C.,	3 75	
R. M. Phillips,	City,	6 00	
Lee T. Blair,	"	5 00	
J. A. Clifton,	Mt. Airy, N. C.,	12 00	By Jan. 15th.
M. Vuncannon,	City,	1 25	
J. M. Cunningham,	"	15 00	See Mr. King.
P. Vaughan,	"	5 00	
W. C. Smith,	"	3 00	
		$392 17	

Arrears from January 1st to April 1st, 1901.

Mrs. J. B. Fields,	$ 2 25
C. H. Ireland,	13 00
Ying Sing,	1 50
John Lewis,	2 00
Mrs. J. W. Payne,	7 50
Giles Mebane,	3 75
E. G. Newcomb,	18 00
A. H. Leftwich,	2 00
Hon. D. Schenck,	5 00
D. W. Carl,	1 25
John M. Dick,	61 57
R. M. Douglas,	3 00
Geo. A. Grimsley,	3 75
J. H. West,	3 75
W. M. Perdew,	1 25
J. W. Schoolfield,	1 25
Mrs. D. A. Owens,	1 25
O. W. Carr & Co.,	1 25
R. A. Gilmer,	1 25
C. N. McAdoo,	13 25
Sam Brown,	3 00
Neil Ellington,	2 50
M. C. Workman,	6 25
F. F. Smith,	1 25
Dr. G. W. Whitsett,	5 00
Greensboro Natl. Bank,	1 25
Charles Van Noppen,	3 00
Estate D. W. C. Benbow,	5 75
Will Pleasants,	2 00
W. H. Turner,	1 25
P. C. Pope,	2 00
John L. King,	3 50
	$184 57

(136) Forward,	184 57
Thos. J. McAdoo,	2 50
J. W. Landreth,	1 50
M. A. Whittington,	1 25
John A. Barringer,	4 00
J. C. Kirkman,	2 50
O. Williams,	2 00
W. F. Bogart,	7 50
W. P. Bynum,	1 25
G. Will Armfield,	5 50
W. B. Hunt,	1 35
Mrs. M. E. White,	6 25
Mrs Geo. A. Mebane,	5 00
Prof. J. Y. Joyner,	3 00
D. L. Hagan,	6 00
John Weatherly,	3 00
Mrs. Wood,	1 67
J. W. Whitsett,	1 25
Geo. A. Smith,	2 00
W. B. East,	3 25
R. M. Phillips,	2 00
J. C. Murchison,	3 75
Lee T. Blair,	2 50
Piedmont Iron Co.,	14 81
Mrs. F. E. Stockton,	2 00
A. T. Vernon,	1 25
E. R. Breweer,	1 25
A. E. Holt,	3 75
E. R. Michaux,	2 00
C. B. Wilkerson,	1 25
D. H Blair,	1 25
George Dick,	4 25
H. L. Lee,	2 00
Prof. L. L. Hobbs,	1 25
Mrs. Bettie Barnes,	1 25
J. J. Harris,	3 00
Groom Brothers,	9 75
Evening Telegram,	3 25
Greensboro Bobbin Works,	13 36
W. C. Smith,	3 00
Mrs. E. H. Scales.	3 75
A. B. Creech,	3 25
	$329 16

List of Accounts and Claims Owing by the Defendant Company at and before the Receivership.

Odell Hardware Company,	2 83
W. P. Roberson & Son,	18 00
Greensboro Publishing Co.,	2 75
(137) O. D. Boycott,	20 00
Castner, Curran & Bullitt,	78 87
J. R. Rich & Son,	17 79
Merchants Grocery Co. (Alum),	2 25
Thos. J. McAdoo, Telephone, $12.50 less $2.50,	10 00
R. R. King, treasurer, on salary,	75 00
W. J. Benbow for water,	100 00
Tatum & Taylor,	7 00
Bynum & Bynum, fees for professional services,	
King & Kimball, fees for professional services,	

Endorsed:

Filed in this office Aug. 5, 1901.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXHIBIT NO. " B."

Contract Ex. A.

(138) An ordinance authorizing W. W. Taylor, of Philadelphia, Charles S. Hinchman, of Philadelphia, and Fred B. Hubbell, of Baltimore, to construct and maintain and operate water works to supply the City of Greensboro, North Carolina, and its inhabitants with water, and defining their rights, duties, privileges and powers.

Section 1. That the said Charles S. Hinchman, W. W. Taylor and Fred B. Hubbell be, and they are hereby, empowered to build, construct, maintain, own and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use, to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of said city, subject to the conditions hereinafter named, to use within the present and fnture limits of said city any and all streets, avenues and alleys and bridges, and such other public grounds as are now or may be hereafter laid out while constructing or repairing such water works, to receive, take, store and purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses and other ap-

pliances and attachments necessary or expedient for the proper conducting and carrying on said water works, to cross any street in said city, in laying or extending their pipes, conduits or acqueducts as may be necessary and proper for the distribution of water throughout said city, so as to afford the most adequate supply for all domestic uses and the greatest protection against fire.

Provided, however, that the said grantees aforesaid shall not permanently use any street, avenue, alley, bridge or public grounds above named or occupy the same for any longer time than necessary for the purpose hereinafter indicated, without the permission of the Board of Commissioners, first obtained.

Nor shall the aforesaid grantees permanently injure any street, avenue, alley, bridge or other public grounds above named, but shall restore them to the like condition as it found said streets, avenues, alleys, bridges and public grounds aforesaid, saving the necessary and proper underground work. Provided also that the supply of water hereinbefore named shall continue sufficient for all domestic, sanitary and fire purpose and individual use.

Said grantees are to have the exclusive right to construct, maintain and operate said water works as hereinafter specified, and on the conditions, terms and liabilities set out in this ordinance for the term of twenty years from the date of the completion and acceptance of said water works, and unless such rights shall sooner be terminated as hereinafter provided by purchase or forfeiture, all such rights and liabilities shall continue for another like period of twenty years, unless said additional term of twenty years be also ended as above provided by purchase or for-
(159) feiture.

Sec. 2. The plant of the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works shall be amply sufficient to supply water for the purposes hereinafter mentioned to at least twenty thousand people and to be enlarged and extended to supply a greater actual population, if so required by the Board of Commissioners of the city for the necessities of its inhabitants.

Sec. 3. In case there shall be any disagreement or controversies between the City of Greensboro and the grantees aforesaid in regard to the supply of water or the quality of and quantity thereof or the manner of supplying the same, either party shall have a right to demand in writing of the other, that such manner of dispute, disagreement or controversy be submitted to arbitration, one arbitrator to be

chosen by each party, who are to be non-residents of the City of Greensboro and impartial and disinterested persons, and if they disagree they shall have power to call in an umpire, and the award of the two arbitrators, or one arbi trator and the umpire, filed in writing with the parties and signed by them, shall be final and binding upon both parties, and either party shall have the right to have the same specifically performed in a court of equity or other appropriate judicial tribunal and a failure to perform such award in a reasonable time by the aforesaid grantees shall work a forfeiture of its rights under the ordinance.

Provided that if the dispute or controversy be in regard to the quality of the water, the arbitrators and umpire shall be chemists of good reputation.

Sec. 4. The machinery, pipes, hydrants, valves, pumping plant and all other like appurtenances and fixtures used in the water works and in supplying the water are to be first-class in their material and the manufacture thereof.

The grantees aforesaid guarantee and stipulate that (140) the water supplied shall be pure and wholesome, and that the supply shall be, and continue adequate to the demand for the same by the city or its inhabitants.

Sec. 5. During the progress of the work the grantees aforesaid, shall not unnecessarily obstruct any street, avenue, alley or public ground in laying its pipes or conduits. They will properly repair and make good any gas or sewer pipes, previously laid, which shall be disturbed, misplaced, or injured by it, and complete each part of work commenced as speedily as possible and restore all the ground disturbed, to as good condition as it was before the work began, and that in the erection, construction and repair of said work in any street, avenue, alley, bridge or other public grounds aforesaid, and removing pavements, curbstones or side walks or other public grounds, and making all necessary excavations for repairs. The grantee aforesaid shall suitably guard and protect the same by enclosures, lamps, watchmen or by the use of any other precaution necessary to prevent injury to persons and property by reason thereof, and said grantees aforesaid shall be liable for all damages for failure to so guard and protect persons and property from injury, when occasioned by its negligence and shall save the city harmless therefrom.

Sec. 6. The water works shall be complete in all its details. The pump house erected shall be of brick, covered with metal and of substantial and neat architecture and, as far as possible, protected from fire. There shall also be

in connection with said pump house, near by or as a part thereof, an engineer's dwelling house to be occupied by the engineer or some suitable, intelligent and efficient employee of the grantees who shall, at all hours, be accessible to the call from the city for water.

That these houses, or such one as may be suitable and necessary, may be connected at the expense of the city with the fire department of the city, or other places designated by the city, by telephone, electrical apparatus or any like suitable appliances, by which alarms, calls and com-
(141) munications may be had at all hours with the engineer or employees at said pump houses or dwelling houses aforesaid, and so as to make the communication of threatened danger or want of water or other demand as speedy and as sure as possible.

And the grantees are to keep a suitable, intelligent and efficient employee always at a post where he shall be accessible to the alarms, calls and communicatiens, above named, and shall respond promptly to such alarms, calls and communications.

Sec. 7. The engines and machinery shall be in duplicate and in the beginning, fully adequate and adapted to the ultimate requirements and stipulations of this ordinance and contract.

The machinery and appurtenances shall be sufficient to give a capacity of one and a half millions of gallons (1,500,000) in twenty-four hours against a pressure of two hundred (200) feet head.

The storage water tank from which the supply of water comes immediately shall be at its top water level one hundred feet (100) above the surface of the ground at the center of the public square near the court house and shall be large euough to hold at least one hundred thousand (100,-000) gallons of water, and it shall be filled by the grantees aforesaid to its top every day an hour before sun down.

Sec. 8. For the extinguishment of fires the pumping engine shall be kept ready at all times to supply the needed fire pressure.

Sec. 9. The grantees aforesaid shall submit their water works, when finished, to the following as a test of its capacity and efficiency: They agree that the works shall throw six (6) streams of water from six (6) hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred feet (100) of hose and a one-inch ring nozzle.

Sec. 10. All the water mains and pipes used by the

grantees aforesaid shall be of the best quality, coated inside and outside with Dr. Angus Smith's patent coal tar (142) varnish, and shall be tested at their place of manufacture to withstand a hydrostatic pressure of three hundred pounds to the square inch.

The distribution of pipes and the location of hydrants shall be as indicated in a map to be furnished by the city subject to be changed at any time by the city at its own expense. The pipes shall be laid and properly embedded in the ground of sufficient depth to prevent freezing. Not in any case to be less than two (2) feet from the surface.

The grantees aforesaid agree to extend the pipes whenever required so to do by the Board of Commissioners on condition that there shall be placed on said extension of piping twelve hydrants to the mile, for the rental of which the city will pay thirty-five dollars ($35.00) each, and which price shall be the rental of all hydrants over seventy-five.

Sec. 11. The grantee aforesaid agree to furnish a better hydrant than the Matthews double opening fire hydrant and to use the Eddy valve.

If the hydrants put in by the grantees shall be unsatisfactory in its operations to the city of Greensboro, it may require the grantees aforesaid to submit the matter to arbitrators as hereinbefore provided, and the grantees agree, if the arbitrators so award, to change the hydrants to the one designated by the arbitrators.

All the hydrants shall be made to fit on any particular hose coupling which shall be indicated in writing, by the City of Greensboro. The indication in writing to be furnished in twenty days from the execution of this contract.

Sec. 12. The city agrees to use the hydrants for the extinguishment of fire only, subject to exceptions hereinafter named, to-wit:

(1) The grantees aforesaid agree to furnish water to the city from the hydrants for street sprinkling, flushing gutters and sewers, fire drill and all other public city uses (143) and purposes (not specified in the schedule of prices and free supplies) at the rate of two-fifths of a cent per barrel or ten (10) cents per one thousand (1,000) gallons.

The grantees aforesaid agree that they will furnish the following supplies free of charge, to-wit:

(1) One telegraph faucet in each of the two public schools.

(2) One fountain in the central portion of the city for the personal use of passers-by, horses from the country and

those in draft here, but not to be used by horses led indiscriminately from stables in the city to be watered at this fountain. Nor is water to be carried from the fountain for the use of citizens or others, nor of stock except as above provided.

Sec. 13. The size of the piping shall be as follows, to-wit:

From the pumping station to the south end of South Elm st.,	10 inches.
From this ten-inch pipe on South Elm street to the storage tank,	12 inches.
Along West Market from Elm to Edgeworth street,	8 inches.
Edgeworth street to Cedar street,	6 inches.
Cedar street to College,	6 inches
Elm street to Forbis street,	8 inches.
Forbis street to Gilmer street,	4 inches.
On Cedar street,	4 inches.
On Spring street,	4 inches.
On Edgeworth street,	6 inches.
On Eugene street,	4 inches.
On Ashe street,	4 inches.
On Green street,	4 inches.
On Davie street from Market to N. C. R R.,	6 inches.
On Davie South of N. C. R. R.,	4 inches.
On Forbis street,	4 inches.
On Percy street,	4 inches.
On Gaston street,	4 inches.
On Sycamore street,	4 inches.
On East Washington street to Forbis street,	4 inches.
(144) On West Washington street,	4 inches.
On New street,	4 inches.
On Asheboro street,	8 inches.
On Depot street,	6 inches.
On Church street,	6 inches.
On Lindsay street,	4 inches.

It is the further agreement and understanding of the parties to this contract that if at any time hereafter it shall appear to the city that the foregoing sizes of of piping are inadequate to the supplies needed in those localities that the City of Greensboro shall have the right to indicate its opinion in writing to the grantees aforesaid and request an arbitration to settle the matter. It shall then be the duty of said city and grantees aforesaid to appoint arbitrators as hereinbefore provided, and if they award that the piping shall be increased, it shall be the duty of the grantees aforesaid to change the piping according to the award, and

to begin such work within twenty (20) days after the award in writing is furnished to said grantees.

Sec. 14. The grantees aforesaid shall furnish supplies of water to the Greensboro Female College and Bennett Seminary, if desired by them, at the same rates and prices and on the same conditions, terms and regulations as it furnishes supplies to the City of Greensboro and its inhabitants.

Sec. 15. If the hydrants get out of order it shall be the duty of the grantees aforesaid to use all the diligence to repair the same and shall forfeit two dollars ($2.00) per day to the City of Greensboro for every day that it fails to perform said duty.

Sec. 16. The grantees aforesaid shall have the right to make all reasonable and just rules and regulations governing the service of water to private consumers as may be necessary for their protection in that behalf and may enforce the observance of the same by cutting off the supply of water or otherwise, and shall have the right at all reasonable hours of the day to have access to the water pipes and metres of any taker; to protect itself from abuse and (145) fraud, or repair or observe or remove the same, and may require all water takers to sign a contract embracing these rules and regulations.

The City of Greensboro shall protect the works and property of the grantees afaresaid in said city by suitable ordinances.

Sec. 17. The grantees aforesaid shall furnish the City of Greensboro a description and draft of its machinery, appurtenances, fixtures, location and size of piping, hydrants, storage tank, pump houses and other houses and other like information desired by the city to give the Board of Commissioners an intelligent and comprehensive idea of the extent, kind and condition of its whole water works and its connections.

Sec. 18. The grantees aforesaid shall put in gate valves in sufficient numbers to divert and control the water and have as few dead ends as possible.

Sec. 19. The said grantees aforesaid shall constantly, day and night, except from unavoidable accident, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said services, and shall maintain a head of at least seventy (70) feet in the stand pipe or storage tower, except in case of unavoidable accident or when the water is drawn off to cleanse the tank.

Sec. 20. The grantees aforesaid shall furnish water supplies to the city and its inhabitants at the following maximum prices, to-wit:

Tariff of charges per annum, payable semi-annually in advance:

Banks, churches, stores, &c.,	$ 5 00
Bakeries (not less than $10.00 daily average one barrel flour each, - - -	4 00
Barbers, each chair, - - - -	3 00
Baths, private (hot water) each $1.00 extra,	3 00
Baths, public, each (includes hotels and boarding houses), - - - -	10 00
Smith shops, per fire, - - - -	2 50
Building, brick per M., stone, per porch, 5 cents; plastering per square yard (146) ½ cents, - - - - -	
Hotel, per room, - - - -	1 20
Boarding house, room rates (no charge less than $10.00), extra for each boarder, 50 cents, - - - - - -	
Laundries and washer-women, - -	$8 00 to 20 00
Printing offices—weekly—hands or less (each additional hand, 50 cents), -	8 00
Photo. gallery, - - - - -	$10 00 to 15 00
Residence, for general domestic use—4 rooms or less, - - - - -	5 00
Residence, for general domestic use—6 rooms or less, - - - - -	6 00
Residence, for general domestice use—8 rooms or less, - - - - -	7 00
Residence, for general domestic use—10 rooms or less, - - - - -	9 00
Residence, for general domestic use—12 rooms or less, - - - - -	10 00
Residence, for general domestic use—more than 12 rooms, - - - - -	11 00
Restaurants, - - - - - -	$8 00 to 15 00
Private stable—horse and carriage, each -	1 50
Public stables—horse and carriage, each -	2 00
Steam boiler, per horse power, up to 15, special, - - - - - - -	
Saloons, beer, &c., - - - - -	10 00
Pavement washer, including street sprinkler ½ width of street, per each 25 feet front (each add. 25 feet or fraction 2.00),	3 00
Irrigation—lawns, gardens, &c., per 1,000 sq. ft. or fraction, - - - -	1 50

Meter measurement (no charge less than $10.00, per 1,000 gallons, 25 cents; factories, fountains, school, &c., special rates.

And consumer shall have the right to put in a meter and pay for water at the meter rates. The grantees aforesaid shall also have the privilege of putting in a water meter and charging for the water at meter rates.

The water rents charged by said grantees to consumers for domestic and manufacturing purposes shall not exceed the average rates charged in other towns in this State (147) supplied by a like system. The connection between the main and the consumer shall be made at the expense of the consumer and the lowest annual rate for any one consumer shall be five dollaas, $5.00.

Sec. 21. The grantees aforesaid shall begin active operations in good faith on the water works in thirty days from the time this ordinance is passed and accepted by the grantees aforesaid, and the grantees aforesaid shall have the said works completely finished by the 30th day of April, 1888, ready for tests hereinbefore provided for and for the acceptance of the City of Greensboro.

Sec. 22. The grantees aforesaid shall not employ convict labor on tne works, and shall, as far as practicable, employ labor from this vicinity.

Sec. 23. The City of Greensboro shall pay for the rental of the seve nty-five hydrants, hereinbefore provided for, the sum of two thousand, eight hundred and seventy-five dollars ($2,875.00), payable semi-annually, the first day of July and tht 1st day of January, of each year. The first payment of the fraction to be payable the 1st day of July, 1888.

Sec. 24. At the expiration of ten years from the passage of this ordinance, and at each recurring ten years thereafter, the City of Greeensboro shall have the right to purchase the said water works of said grantees at such price or on such terms as may be agreed upon; but in case the parties cannot agree as to the price and terms, the city may give three months notice to the grantees aforesaid of its desire to purchase said water works, and it shall then be the duty of each party to appoint a disinterested arbitrator, not a resident of Greensboro, and these two, if they disagree as to the price and terms of the purchase, shall call in an umpire chosen by them and the award of a majority of the three, or of the two arbitrators, shall be final

and binding on the parties, and if the grantees aforesaid refuse to abide by the award, they shall forfeit all their rights under this ordinance as a contract.

The award of the arbitrators shall be in writing, and (148) furnished to each of the parties. The city shall have the option, within ten days after the award is made, to accept or reject the purchase at the price and on the terms awarded by the arbitrators.

If the city declines to purchase, it shall pay the expense of the arbitrators, otherwise to be divided between the parties.

Sec. 25. The city shall be responsible to the grantees aforesaid for any injury negligently done to the hydrants by any of its employees.

Sec. 26. Whenever the words "Grantees aforesaid" are used, they stand for the parties to whom this franchise is granted.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXHIBIT "E."

Hugh L. Pope Deed from R. R. King and A. H. Taylor, Commissioners.

(149) This deed made this 30th day of April, in the year one thousand and eight hundred and ninety-six by Robt. R. King and Archibald H. Taylor, Commissioners, as hereinafter more particularly described, the parties of the first part, unto Hugh L. Pope, of Baltimore City, pasty of the second part, Witnesseth:

Whereas, the Greensboro Water Company, a body corporate under the laws of the State of North Carolina, executed a mortgage or deed of trust on all its works and property of any kind whatsoever, powers, franchises and privileges then acquired or thereafter to be acquired, which mortgage was dated the first day of May, 1891, and was made unto Robert R. King, of Greensboro, North Carolina, and Archibald H. Taylor, of Baltimore City, Maryland, and was duly recorded according to law in the office of the Register of Deeds of Guilford County, North Carolina, being registered in Record Book number 83, pages 703 to 724, inclusive, and which mortgage purported to secure an issue of certain mortgage bonds of said last named company particularly mentioned and described in said mortgage.

And, whereas, there was a default under the terms of said mortgage and proceedings were instituted by the holders of the bonds secured under said mortgage to foreclose the same to sell the property mentioned therein, in the course of which proceeding a certain James D. Glenn was appointed receiver of the said mortgaged property, and by decree of the Circuit Court of the United States for the Western District of North Carolina, in which said proceedings took place, and were entitled J. W. Middendorf et al. *vs.* The Greensboro Water Company et al., the said Robert R. King and Archibald H. Taylor, the parties of the first part, being the mortgagees and trustees in the said mortgage named, were appointed commissioners to sell said mortgaged property in accordance with the terms of said (150) mortgage and also all acquisitions, additions and improvements thereto made and acquired by the said receiver in the course of the operation of the said property, as was further provided by the terms of the several orders and decrees of the court in said proceeding.

And, whereas, the said Robert R. King and Archibald H. Taylor, the parties of the first part, after complying with all the terms of said mortgage, or deed of trust, and the directions of the court in the premises, offered the said property at public sale in front of the United States Court House in Greensboro, North Carolina, on the 6th day of April, in the year eighteen hundred and ninety-six, and did sell the same at and for the sum of thirty-one thousand dollars to Hugh L. Pope, of Baltimore City, who became the purchaser of said property for himself and associates, to be immediately organized as a body corporate under the laws of the State of North Carolina, and in all respects in accordance with said laws, and to be known as the Greensboro Water Supply Co.

And, whereas, the said Hugh L. Pope, purchaser as aforesaid, hath paid and delivered unto the said Robert R. King and Archibald H. Taylor, commissioners of sale, as aforesaid, the parties of the first part, the whole of the purchase money for the property and franchises so as aforesaid purchased by him, strictly in accordance with the terms of the decree of sale above mentioned, which sale was duly ratified by a decree of the Circuit Court of the United States for the Western District of North Carolina, passed in the above mentioned proceedings of date April 7th, 1896, and said party of the second part became entitled to receive a good and proper conveyance of all the above mentioned property and franchises of the Greensboro Water Company sold under and by virtue of the terms of the mortgage and of the decree above mentioned;

Now, this deed Witnesseth: That in consideration of the premises and of the aforesaid sum of thirty-one thousand, $31,000, by the said party of the second part to the said parties of the first part paid and accounted for, the receipt of which is hereby acknowledged, the said parties (151) of the first part, do hereby grant, convey, bargain and sell, transfer, assign and set over unto the said party of the second part, his successors and assigns, all of the property, real and personal and mixed, and all of the rights, title, interest at law and in equity, privileges, powers and franchises and earnings and revenues belonging to or acquired by the said Greensboro Water Company or exercised and acquired by the said James D. Glenn, receiver as aforesaid, under and by virtue of the laws and acts of Assembly of the State of North Carolina, and under and by virtue of the acts and concessions and remissions of the corporation of the City of Greensboro or its Board of Aldermen or other city officers or representatives and of the county officers, authorities or representatives of the County of Guilford of the State of North Carolina, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, and all the real estate, personalty, rights of way or other easements of property of any sort or description whatsoever in the State of North Carolina or wheresoever situated of the said Greensboro Water Company, or of the said receiver thereof, including particularly all the water works, dams, reservoirs, tanks, pumps, basins, pipes, mains, hydrants and fire plugs, owned or acquired by the said Greensboro Water Company or its receiver, and all machinery, engines, tools, implements and materials for constructing, operating or repairing the said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money, and income arising or to arise from the operation of the said water works under the franchises granted or belonging to the said Greensboro Water Company.

To have and to hold the property, rights, franchises, and privileges hereby specially mentioned to be conveyed unto and to the use of the said party of the second part, his assigns and associates as he may hereafter declare the same by deed or other conveyance and allotment, whether by the name of the Greensboro Water Supply Company or by such other corporate name as may be lawfully assumed and declared by the said party of the second part and his associates as they may or become incorporated according to law. Subject, however, to the operation and effect of a mortgage dated the 10th day of Jan'y, eighteen hundred and eighty-eight, and executed by the Greensboro Water

Company unto the Guarantee Trust and Safe Deposit Com-
(152) pany and recorded among the land records of Guilford County, North Carolina, in the office of the Register of Deeds of said county, purporting to secure an issue of fifty thousand dollars, $50,000, of first mortgage bonds of said company.

In witness whereof the said parties of the first part have hereunto set their hands and seals this 30th day of April, in the year one thousand, eight hundred and ninety-six.

ROBERT R. KING, [Seal]
ARCHIBALD H. TAYLOR, [Seal]
Commissioners of sale, etc.

STATE OF NORTH CAROLINA, Guilford County, } To-wit:

I hereby certify that before me, the undersigned clerk of the Superior Court of Guilford County aforesaid, personally appeared, this, the 15th day of June, in the year one thousand, eight hundred and ninety-six, the above named Robert R. King and Archibald H. Taylor, commissiners of sale, being the parties of the first part in the foregoing deed mentioned, and each acknowledged the due execution of the foregoing deed, and that he signed and sealed the same as above appears to and for the uses and purposes in said deed set out. Therefore, let said deed, with this certificate, be recorded. As witness my hand this 15th day of June, in the year eighteen hundred and ninety-six

ED. L. RAGAN,
Clerk Superior Court for Guilford County.

Filed for registration November 27, 1896, at ten fifteen o'clock A. M., and duly recorded.

A. G. KIRKMAN,
Register of Deeds.

The foregoing is recorded in Book, Record of Deeds, No. 104, at pages 652 *et seq.*, in the office of the Register of Deeds for Guilford County, N. C.

Endorsed:

Filed in this office August 15, 1901.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXHIBIT "F."

Greensboro Water Supply Deed from Hugh L. Pope.

(153) This deed made this the 30th day of April, in the year one thousand, eight hundred and ninety-six by Hugh L. Pope, of Baltimore City, the party of the first part, unto the Greensboro Water Supply Company, a body corporate, under the laws of the State of North Carolina, the party of the second part, Witnesseth:

Whereas, the said party of the first part became the purchaser of the property and franchises of the Greensboro Water Company at the sale thereof made by Robert R. King and Archibald H. Taylor, commissioners of sale, under a decree of the Circuit Court of the United States for the Western District of North Carolina, which sale was duly ratified by said court and a deed of even date herewith was made and delivered by said Taylor and King, commissioners as aforesaid, unto the said party of the first part, which deed has been duly recorded among the land records of Guilford County, in the office of the Register of Deeds of said Guilford County, prior to the recording of this conveyance, and which deed is herein referred to for the purpose of adopting the recitals therein contained, and the description of the property thereby conveyed as fully as if the same were made a part of this conveyance and incorporated herein.

And, whereas, the said Hugh L. Pope, the party of the second part, purchased the property and franchises aforesaid, and hereby conveyed, on behalf of himself and associates, contributing and paying according to a certain proportion agreed and understood between them, the purchase money of the said property and intending to become organized by virtue of the said purchase under the laws of North Carolina, as a corporation known as the Greensboro Water Supply Company;

And, whereas, the said Pope and his associates has duly organized themselves into said corporation under the name and style aforesaid by writing and subscribing the number of shares subscribed for and allotted to each subscriber in a book kept for that purpose in the office of said body corporate, the party of the first part, and the said (154) body corporate has become duly organized and incorporated under the laws of the State of North Carolina, with a capital stock of the par value of seventy five thousand dollars, divided into fifteen hundred shares of fifty dollars each, all which shares have been duly subscribed for and paid for by the several subscribers therefor, whose names are set out in the record book referred to, and it is

intended hereby to especially declare said body corporate as duly incorporated according to law and entitled, by the terms of the purchase aforesaid, to have and receive all the property, rights and franchises of the said Greensboro Water Company, being the same which were conveyed to the said Hugh L. Pope by the terms of a deed from the said Taylor and King to said Hugh L. Pope, above referred to.

Now, this deed, Witnesseth: That in consideration of the premises and the sum of five dollars and other good and valuable considerations, by the said party of the second part to the said party of the first part paid, the said party of the first part, doth hereby grant, convey, bargain and sell unto the said party of the second part, its successors and assigns, all the property, real, personal and mixed, and all the rights, title and interest, at law or in equity, privileges, powers and franchises and earnings and revenues belonging to or acquired by the said Greensboro Water Company or exercised and acquired by the said James D. Glenn, the receiver as aforesaid, being the same property, rights and franchises which are mentioned and described in a deed of even date herewith from the said Robert R. King and Archibald H. Taylor, commissioners, etc., to the said Hugh L. Pope, the party of the first part.

To have and to hold the property, premises and franchises hereby conveyed and intended to be conveyed unto and to the use of the said party of the second part, its successors and assigns, as a body corporate, duly incorporated under the laws of North Carolina, and duly entitled to receive, accept, hold, exercise and operate all the property and franchises of the said Greensboro Water Com-
(155) pany, a body corporate, heretofore incorporated under the laws of the State of North Carolina.

In witness whereof the said party of the first part hath hereto set his hand and seal the day and year aforesaid.

HUGH L. POPE.

Test:

HENRY R. DULANEY.

STATE OF——————, }
City of——————, } To-wit:

I do hereby certify that Hugh L. Pope, the party of the first part in the foregoing deed mentioned, and whose name is signed thereto, personally appeared before me this day and acknowledged the due execution of the foregoing

deed. Witness my hand and official seal this 9th day of————, in the year 1896.

Henry Rozier Dulaney, Notary Public, Baltimore, Md. HENRY R. DULANEY, Notary Public.

STATE OF NORTH CAROLINA, Guilford County.

I, Ed. L. Ragan, Clerk of the Superior Court for said county, do adjudge that the foregoing deed has been properly acknowledged, and that the foregoing certificate of Henry R. Dulaney, Notary Public, duly attested by his official seal is correct. Therefore, let said deed with the certificates be registered. This 27th day of November, 1896.

ED. L. RAGAN, C. S. C.

Filed for registration November 27, 1896, at ten twenty-five o'clock, A. M., and duly recorded.

A. G. KIRKMAN, Register of Deeds.

The foregoing is duly recorded in book Record of Deeds No. 104, at pages 656, *et seq.*, in the office of the Register of Deeds for Guilford County, North Carolina.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXHIBIT "G."

(156) This deed made this the first day of July, in the year of our Lord one thousand, eight hundred and ninety-six, by the Greensboro Water Supply Company, a body corporate, created and duly incorporated under the laws of the State of North Carolina, the party of the first part, unto the Guardian Security, Trust and Deposit Company of Baltimore City, as trustee, a body corporate, duly incorporated under the laws of the State of Maryland, the party of the second part, whereas

The said party of the first part is the successor to all the rights, franchises and privileges of the Greenaboro Water Company, a corporation heretofore created and incorporated under the laws of North Carolina, by virtue of the articles of agreement and letters of incorporation duly filed and recorded, according to law, in the clerk's office

of the Superior Court of Guilford County, North Carolina, the twenty-ninth day of December, 1889, as will appear by reference to said letters of incorporation, and which last named body corporate was recognized as duly incorporated, and was granted certain additional franchises, powers and privileges by an act of the General Assembly of the State of North Carolina, entitled "An act to ratify and amend the charter of the Greensboro Water Company," ratified March 3rd, one thousand, eight hundred and ninety-one, and hath received other and further franchises, powers and privileges by virtue of the laws and acts of the General Assembly of North Carelina, as well as by virtue of certain acts, ordinances and grants and concessions and privileges of the corporation of the City of Greensboro and the County Officers, authorities and representatives of the County of Guilford in the State of North Carolina, and hath received other rights, licences, powers and privileges by virtue of the acts, deeds, permissions and agreements of other persons and bodies corporate:

And, whereas, the said last named body corporate, (157) the Greensboro Water Company, executed a mortgage or deed of trust on all its works and property of any kind whatsoever, powers, franchises and privileges, then acquired or thereafter to be acquired, which mortgage was dated May first, eighteen hundred and ninety-one, and was made unto Robert R. King, of Greensboro, North Carolina, and Archibald H. Taylor, of Baltimore City, Maryland, and was duly proven for record in the Superior Court of Guilford County, North Carolina, and was duly registered May the twenty-sixth, eighteen hundred and ninety-one, in Record Book No. 83, pages 703 to 724, inclusive, in the office of the Register of Deeds of said Guilford County, and which mortgage was given to secure an issue of certain mortgage bonds of said last named company, particularly mentioned and described in said mortgage:

And, whereas, there was a default under the terms of said mortgage, and proceedings were instituted by the bondholders to foreclose the same, in the course of which proceedings a certain James D. Glenn was appointed receiver of the said mortgaged property, and by decree of the Circuit Court of the United States for the Western District of North Carolina, in which said proceedings took place, and were entitled "J. W. Middendorf et als. *vs.* The Greensboro Water Company et als.," Robert R. King and Archibald H. Taylor were appointed commissioners to sell said mortgaged property in accordance with the terms of said mortgage, and in accordance with the terms of the said decree of court in said proceedings:

And, whereas, the said Robert R. King and Archibald H. Taylor, after complying with all the terms of said mortgage or deed of trust, and the directions of court in the premises, did offer the said property at public sale in front of the United States Court House, on the 11th day of April, 1896, and did sell all the property and franchises, rights and privileges of the above mentioned Greensboro Water Company at and for the sum of thirty-one thousand dollars to Hugh L. Pope, of Baltimore City, who became the purchaser of said property for himself and associates, (158) to be immediately organized as a body corporate under the laws of the State of North Carolina, and in all respects in accordance with said laws, as the Greensboro Water Supply Company.

And, whereas, the said Hugh L. Pope, purchaser of the property, works and franchises aforesaid, hath duly organized the body corporate, the party of the first hereto and herein named, and hath assigned and allotted the rightful and appropriate number of shares in said body corporate, to each subscriber, according to the proportion or amount of the purchase money or consideration money for the purchase of the works, property and franchises, contributed by each subscriber, all of which appears from the record book kept for that purpose in the office of the said body corporate, the party of the first part.

And, whereas, the said Hugh L. Pope, purchaser, as aforesaid, hath paid and delivered unto the said Robert R. King and Archibald H. Taylor, commissioners of sale, as aforesaid, the whole of the purchase money for the property and franchises, so as aforesaid purchased by him, strictly in accordance with the terms of the decree of sale above mentioned, and which sale was duly ratified by a decree of the said Circuit Court of the United States for the Western District of North Carolina, passed in the above mentioned proceedings, of date April 12th, 1896; and said Pope became entitled to and and hath received a conveyance of all the above mentioned property and franchises of the Greensboro Water Company, ———— both all said works, property and franchises, which existed and belonged to said property at the time of the making of the deed of trust or mortgage to said King and Taylor, trustees, as well as all the works, property and franchises, which had been acquired by said corporation, and belonged to it, and were exercised and held by the said receiver, James D. Glenn in its behalf at the time of the making of said sale, which conveyance or deed is dated April 30th, 1896, and is recorded or intended to be recorded heretofore in the office

of the Register of Deeds of the County of Guilford of the State of North Carolina.

(159) And, whereas, the said Hugh L. Pope immediately, upon the couveyance to him of the property and franchises above mentioned, and in pursuance of the understanding and agreement under which the said purchase of said property and franchises was secured by him, as aforesaid, hath further conveyed and assigned unto the said body corporate, the party of the first part, all the rights, powers, privileges, franchises and property of any and all descriptions whatsoever conveyed to him as aforesaid, by the said Robert R. King and Archibald H. Taylor, commissioners, as appears by a deed of date April 30th, 1896, duly recorded heretofore, in the office of the Register of Deeds of said Guilford County.

And, whereas, the said party of the first part hath heretofore been duly organized, and at a meeting of the subscribers or stockholders of said company, being the first meeting of said shareholders, and held for that purpose, at Greensboro, North Carolina, at the company's office, May 18th, 1896, of which meeting due notice was given by said Hugh L. Pope, the purchaser, as above mentioned, to each stockholder, and a notice of the time and place of said meeting was published in the Daily Record, a newspaper published in Greensboro, North Carolina, for two weeks prior to said meeting, and at which meeting all the stockholders of said company were present in person or by proxy, and which meeting was adjourned, by consent of all present, to Monday June 15th, 1896, at the company's office, and at which adjourned meeting were present in person or by proxy, all the stockholders of the said company, the party of the first part, James D. Glenn was elected president of the said company, and at a meeting of the Board of Directors, the same day, William C. Seddon was appointed secretary, and Robert R. King treasurer; and said James D. Glenn was further elected as president of said company.

And, whereas, at said meeting of stockholders of said body corporate aforesaid, among other proceedings, the following resolutions were passed, viz.:

Resolved, That, in order to repay to the persons by (160) whom it was advanced, the money borrowed by this body corporate, for the purpose of paying a portion of the purchase money for the property heretofore purchased by and conveyed to said body corporrte, and in order to repay and discharge, when the same may fall due and accrue, the first mortgage bonds upon a portion of the property purchased, being bonds of the total amount of $50,-

000, issued under the mortgage dated January 10th, 1888, by the Greensboro Water Company to the Guarantee Trust and Deposit Company of Philadelphia, and recorded in the office of the Register of Deeds of Guilford County, and in order to construct, equip and complete further works and improvements and equipments necessary and desirable for the operation of this company in accordance with the objects and purposes for which it was incorporated, it is deemed to be for the benefit and advantage of this company to issue mortgage bonds secured by a mortgage or deed of trust upon all the property and franchises of the company, to be known as first consolidated mortgage bonds of this company, to the amount of one hundred and ten thousand dollars, and which shall be of the denomination of one thousand dollars each, and shall bear date July 1st, 1896, and shall be payable fifty years after date, with interest at the rate of five per centum per annum, payable semi-annually on the first days of July and January in each year.

And, further, that eighty of said bonds, being the numbers from one to eighty, inclusive, shall be known as Series A, and shall be entitled to a lien upon the mortgaged property, franchises and privileges and earnings and income of the said Greensboro Water Supply Company, prior to all other liens, and prior to to the bonds numbered from eighty-one to one hundred and ten, inclusive, which last mentioned numbers shall be known as Series B of bonds, and shall be entitled to the lien of this mortgage next to and succeeding the lien of Series A.

And, further, the president of this company is hereby authorized to have the form of said bonds prepared, and to execute the said bonds so as above authorized to be issued, (161) in the name of this company, under his hand as its president, and to seal the same with its corporate seal, and to have the same attested by the treasurer of this company, and to deliver the same to be countersigned by the trustee mentioned in the deed of trust or mortgage to secure the same; and the president of this company is further authorized to execute in behalf of this company, and to have the same signed and attested by the secretary of this company, a deed of trust or mortgage or deed in the nature of a mortgage, conveying all its property, real and personal, and of any sort whatsoever, and its rights and franchises, privileges and appurtenances, and its tolls, rents and revenues now owned or which may be hereafter acquired and owned by this company, to the Guardian Trust and Deposit Company of Baltimore City, a body corporate, duly incorporated under the laws of the State of Maryland, to secure the payment of the said bonds, denominated the first con-

solidated mortgage bonds, of this company, in the order and according to the terms of the resolution authorizing said bonds to be issued. And said mortgage or deed of trust shall contain such provisions for the protection and security of the holders of said bonds as the president of this company may deem right and proper to have incorporated therein; and shall express the intention that the lien of Series A of said bonds, above mentioned, shall always be prior to and preferred over that of Series B of said bonds, as well upon the property of said company of all kinds whatsoever, as upon its earning, income, revenue and franchises.

And at said meeting this further resolution was passed.

Resolved, that the form of the said bonds, as aforesaid authorized to be issued, shall be as follows, or to the following effect, to-wit:

United States of America,

Series (A. or B.) Series (A. or B.)

State of North Carolina.

The Greensboro Water Supply Company.

No. $1,000.00

(162) First Consolidated Mortgage Bond.

Know all men by these presents, that the Greensboro Water Supply Company acknowledges itself to be indebted to the bearer hereof in the sum of one thousand dollars, gold coin of the United States, of the present standard of weight and fineness, which sum it promises and binds itself to pay to the bearer or holder hereof, at the office of the Guardian Security, Trust and Deposit Company, in the City of Baltimore, Maryland, on the first day of July, in the year of our Lord one thousand, nine hundred and forty-six, with interest thereon at the rate of five per cent. per annum, payable in like gold coin, semi-annually, at the said Guardian Security, Trust and Deposit Company's office on the first days of July and January in each year, upon the presentation and surrender of the annexed coupons therefor, bearing the engraved fac-simile of the signature of Robert R. King, the treasurer of said company, until the principal shall be fully paid.

This bond is one of a total of one hundred and ten bonds of like tenor and date, numbered consecutively from one to one hundred and ten inclusive, and amounting in

the aggregate to one hundred and ten thousand dollars, and divided into two series, A and B, the first Series A being the numbers from one to eighty, inclusive, and the second, Series B, being the numbers *eighty* to one hundred and ten, inclusive, the payment of which, in the order of the series named, with the interest thereon, as well as the performance by the makers hereof of all the covenants and conditions for the benefit of the holders of said series of bonds made and entered into by the makers hereof, are secured by a mortgage or deed of trust or deed in the nature of a mortgage of even date herewith, and executed by the ——— maker, the said Greensboro Water Supply Company to the Guardian Trust and Deposit Company of Baltimore City, a body corporate, duly incorporated under the laws of the State of Maryland, as trustee for the benefit of the holders of said bonds and duly recorded among the (163) land records of Guilford County, in the State of North Carolina, conveying all the property of any and all kinds whatsoever, rights, rents, revenues, franchises and privileges of the said Greensboro Water Supply Company, now owned or which may *be* hereafter be acquired and owned by said company, to said trustee, and which mortgage or deed is intended to be a first lien from its date upon all property and rights of said company, now owed or hereafter to be acquired. It is further understood to be a condition of this bond and of the said mortgage or deed of trust that the maker hereof guarantees to pay all charges, taxes and assessments, local, municipal, State or Federal, levied or to be levied upon the property of the said Greensboro Water Supply Company, and upon the bonded indebtedness of said company, and to pay to the holder hereof the principal of said bond, and the interest as it may accrue from time to time, free and clear of all such taxes and assessments. This bond shall not be valid, however, unless the same is countersigned by the said trustee under the hand of its president or other officer duly authorized according to the form of certificate set out hereon.

In witness whereof, the said Greensboro Water Supply Company has caused these presents to be sealed with its corporate seal affixed hereto, and to be duly attested by its treasurer, Robert R. King, and to be signed by its president, James D. Glenn, this first day of July, in the year of our Lord one thousand, eight hundred and eighty-six.

[Company's seal]

Treasurer. President.

Coupon:

On the first day of ——— in the year ——— the

Greensboro Water Supply Company will pay to the bearer hereof twenty-five dollars at the office of the Guardin Security, Trust and Deposit Company, in Baltimore City, being the semi-annual interest due at said date on bond No. —— on the first consolidated mortgage bonds of said com-
(164) pany.

Treasurer.

Trustee's Certificate.

This is to certify that this bond is one of a total of one hundred and ten bonds, of one thousand dollars each, secured by and mentioned in the mortgage or deed of trust in said bond referred to.

The Guardian Security, Trust andDeposit Company
of Baltimore City, trustee, by

President.

And at said meeting this further resolution was passed, viz.:

Resolved, that the form of mortgage or deed of trust or deed in the nature of a mortgage, so as aforesaid ordered to be prepared for execution by the president of this company, being this day submitted to the stockholders, in meeting assembled, for their approval, is hereby approved, and the president and secretary of this company are hereby directed to execute the same in accordance with the previous resolution of the stockholders, as of date the first day of July, in the year eighteen hundred and ninety-six, and to deliver the same to the trustee therein named, to be recorded among the Land Records of Guilford County, in the office of the Register of Deeds of said county.

And, whereas, these presents are in the form and to the same effect as, and are intended to be a true copy of the form of the mortgage or deed of trust or deed in the nature of a mortgage approved by the said stockholders in meeting assembled, and was further approved by the Board of Directors of said party of the first part, at its meeting the same day, and authorized to be executed, delivered and recorded.

Now, therefore, this deed Witnesseth: that in consideration of the premises and of the sum of five dollars by the party of the second part to the party of the first part in hand paid, and for the purpose of securing the prompt payment, according to the terms thereof, and in the order hereinafter principally set out, of the full amount of principal and interest of each of the one hundred and ten
(165) bonds above referred to, issued, or to be issued, by

virtue of the said acts, proceedings, declarations and resolutions of the party of the first part, as well as the true and faithful performance of all the covenants and conditions of this deed, by any party hereto to be performed, the the party of the first part, does hereby grant, convey, bargain and sell, transfer, assign and set over unto the said Guardian Security, Trust and Deposit Company of Baltimore City, the said party of the second part, its assigns and successors in trust, all the property, real and personal and all the rights, title, interest at law and in equity, privileges, powers and franchises and earnings and revenues, as well as the right to receive and collect all tolls and revenues owned, possessed, exercised and acquired or hereafter to be possessed, obtained or acquired, by the said party of the first part, under and by virtue of the laws and acts of Assembly of the State of North Carolina, and under and by virtue of the acts and concessions and permissions of the corporation of the City of Greensboro or its Board of Aldermen or other city officers or representatives and of the county officers, authorities or representatives of the County of Guilford of the State of North Carolina, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, and all the real estate, personalty, rights of way or other easements of property of any sort or description whatsoever in the State of North Carolina or wheresoever situated, belonging to the said party of the first part, as well as that which it, the said party of the first part, may hereafter acquire or own, including particularly all the water works, dams, reservoirs, tanks, pumps, basins, pipes, mains, hydrants and fire plugs, owned or acquired or hereafter to be owned or acquired by the said Greensboro Water Supply Company or its successors, and all machinery, engines, tools, implements and materials for constructing, operating or repairing the said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money, and income arising or to arise from the operation of said water
(166) works and profits of any sort whatsoever.

To have and to hold the property, rights, franchises and privileges hereby specially mentioned to be conveyed unto the said party of the second part, its successors in trust and assigns, in fee simple and absolutely, subject, however, to the operation and effect of a mortgage dated the tenth day of January, 1888, and executed by the Greensboro Water Company unto the Guarantee Trust and Safe Deposit Company, and recorded among the Land Records of Guilford County, North Carolina, to secure first mortgage bonds of the Greensboro Water Company to

the amount of fifty thousand dollars, so long as the said last named mortgage bonds, or any part thereof, shall be issued and outstanding and unredeemed, to the amount of such unredeemed bonds, for whose purchase or redemption, however, an equal amount of the bonds herein mentioned to be secured are specifically pledged in trust as hereinafter particularly set out and expressed.

In trust and confidence, nevertheless, and for the following uses and purposes, and none other, to-wit:

First. For the use, benefit, protection and security, as herein mentioned and provided, of the several persons or bodies corporate, their respective representatives, executors, administrators and assigns, who are and shall and may be and become the holders and owners of any and all of the said first consolidated mortgage bonds herein mento be secured, of the total amount of one hundred and ten thousand dollars, of the denomination of one thousand dollars each, and numbered from one to one hundred and ten, inclusive, and hereinbefore described and specified, without preference, priority or distinction whatsoever between or to any holder or holders of the bonds of Series A herein authorized to be issued, and herein mentioned and described, and intended to a first lien upon the property hereby mortgaged and conveyed in trust, and without preference, priority or distinction whatsoever between any holder or holders of said bonds of the Series B herein (167) mentioned as intended to be a lien upon the property hereby mortgaged and conveyed in trust, next after the liens of the bonds of Series A, hereinbefore specially mentioned and enumerated, but to secure the holder and holders of the said bonds, the prompt and punctual payment of the principal and interest of said bonds, according to the tenor and effect of said bonds, and the coupons thereto attached, it being the intention and purpose of this deed that the property and franchises, income and earnings of the said party of the first part, as above described, shall be pledged, and are hereby pledged, to secure the prompt payment at maturity of the said bonds and interest coupons thereto attached, first of all the bonds of Series A, being the bonds numbered from one to eighty, inclusive, and next thereafter of the bonds known as Series B, being the bonds numbered from eighty-one to one hundred and ten, inclusive, as is hereinbefore particularly expressed.

Second. And it is agreed and provided between the parties hereto that the said party of the second part shall receive, retain and hold in its hands, in special trust and

confidence, for the purpose of purchasing, paying off or providing for at maturity the said first mortgage bonds of the Greensboro Water Company, secured by the mortgage dated January 10th, 1888, unto the Guarantee Trust and Safe Deposit Company heretofore mentioned, and equal number of the bonds herein mentioned to be secured, viz.: the numbers one to fifty, inclusive, of Series A of the first consolidated mortgage bonds of the Greensboro Water Supply Company herein mentioned, which bonds thus specially deposited in trust, the said party of the first part shall use and apply, from time to time, as may be advisable, for the purpose aforesaid in purchasing, paying off and acquiring the said first mortgage bonds of the Greensboro Water Company, either by exchanging bond for bond or by selling and disposing of the bonds, so as aforesaid deposited in trust, for the purpose of producing a fund equal to the price to be paid for the purchase or acquisition of the said Greensboro Water Company's first mortgage bonds. And that said first mortgage bonds, when purchased or acquired by the application of the said first (168) consolidated mortgage bonds of the Greensboro Water Supply Company, as hereinbefore authorized, shall be cancelled and delivered up to the said party of the first part, and the said mortgage or deed of trust securing the same shall be cancelled or released. And said party of the second part is bound and hereby agrees to certify or countersign at any time, upon the request of the president of the party of the first part, the bonds herein mentioned to be secured, to an amount not exceeding one hundred and ten thousand dollars in all, and to the number of one hundred and ten of the denomination of one thousand dollars each, as hereinbefore particularly set out. And also to deliver all the numbers of said bonds from fifty-one to one hundred and ten, inclusive, to the said party of the first part, upon the receipt of its president or such other agent or agents as may be duly authorized to receive the same, as aforesaid, in its behalf.

Third. And it is hereby further agreed and declared, and provided between the parties hereto, that if the said party of the first part, its successors or assigns, shall at any time hereafter make default, neglect, refuse or omit, for any period exceeding one month, after the same shall become due or payable, to pay the semi-annual interest or coupons on the bonds herein mentioned and intended to be secured, or any part of said interest or coupons on the whole, or any portion of said bonds, whether of Series A or Series B, or, if the said party of the first part, or its as-

signs, shall hereafter make default, neglect or omit, for any period exceeding one month, after the same shall become due and payable, to pay the principal sum or any one or all of said bonds hereby intended to be secured, or shall suffer or allow any lawful charges or taxes to fall in arrears, or shall suffer or allow any lien, execution or attachment to be levied upon any of the property hereby conveyed, or intended to be conveyed, or shall suffer or allow any of the payments or performances stipulated to be paid or performed, according to the terms of the first mortgage bonds of the Greensboro Water Company, and the mortgage or deed of trust to secure the same, hereinbefore (169) mentioned, to be or remain unperformed, unpaid and in arrears for the space of one month or longer, or shall neglect or fail to keep or perform any covenants or stipulations on its part to be performed, as is herein set out and provided, then, and in such case, and in the event that the default or failure to pay shall have occurred with respect to the bonds and coupons of Series B, herein mentioned, upon the written request of the majority of the holders of said Series B bonds, or if the default or failure to pay shall have occurred with respect to any of the bonds or coupons of Series A upon the written request of the majority of the holders of Series A bonds, then outstanding, exclusive, however, of the Series A bonds held in trust to extinguish the first mortgage bonds of the Greensboro Water Company, as hereinbefore mentioned, which request or requests shall be expressed in writing, it shall be the duty of the party of the second part, the trustee herein named, its survivor or survivors, legal successors or assigns, to enter upon and take possession of the property, premises, water works, mains, pipes and all other estate, real and personal, hereby conveyed and mortgaged, or agreed and intended so to be, and thereupon, itself, or by such agent as it may appoint, operate, manage, control and use the said water works and the real, personal and other estate, premises and franchises, whose possession shall be so acquired, to the best advantage according to their best discretion, and shall appropriate the net income and proceeds derived thereform, after deducting the expense of this trust and management and operation of the said property, including therein all payments falling due and having lawful priority over the indebtedness hereby secured, to the payment in full without any preference, priority or distinction of one bond over another, first, of all interest due and accrued upon the bonds of Series A, and second, of all the interest due and accrued upon the bonds of Series B, until the whole and all and each and every the default upon the

said bonds under the terms thereof, or under the terms of
(170) this mortgage, or deed of trust, shall have been fully repaid, made up, repaired and redeemed. And it shall further be the right and duty of said trustee, in case of any such default by the party of the first part, as herein mentioned, upon notification of the determination to that effect, by the bondholders of either Series A or B, as is hereinbefore provided, to declare the principal of said bonds, or of either series thereof, to be finally due and payable, and this, whether after entering upon and taking possession of said property and premises hereby conveyed, or whether without so doing, and to proceed to have this mortgage or deed of trust finally foreclosed and to sell at public auction, to the highest bidder, all the hereby conveyed rights, property, premises and franchises, after giving not less than two months notice of the time, place and terms of sale, by advertisement, at least twice a month in one or more newspapers published in Guilford County, North Carolina, and in one or more newspapers published in the City of Baltimore, and such other advertisements as may to the trustees seem proper. The terms of such sale to be all cash, or so much cash and the balance secured upon the property sold and otherwise, as shall, in the exercise of the best discretion of said trustee, be for the benefit of the holders of said bonds, then outstanding and intended to be secured hereby. And upon such sale and the satisfaction and payment to the trustee of the purchase money, it, the said party of the second part, its successor, successors and assigns, shall by good and sufficient deeds to that purpose convey the said property, premises and franchises, so as aforesaid granted and sold by them, to the purchaser or purchasers thereof, free from all and every the trusts hereby created, and all and every claim or demand of any person whatsoever, saving and excepting such lawful prior liens, claim or demands of any persons or bodies corporate which may be especially declared and accepted by said trustee or its successors, when making said sale, and as part of the terms thereof, and without liability on the part of the purchaser or purchasers at said sale to see to the application of the purchase money. And the said trustee or
(171) its successors shall or will then appropriate the purchase money (after deducting therefrom the expenses of this trust, including the counsel fees and the other expenses incurred by them, as well as the commission to said trustee, or its successors, for their services in administering this trust, and procuring such foreclosure and making said sale) to the payment as aforesaid, first, of all the principal and interest accrued to date upon all the bonds

of Series A hereby secured, and then issued and outstanding in full, if the said purchase money be sufficient or, if not, then *pro rata*, and without distinction between interest and principal and, if there shall be a surplus, after the payment of all the bonds oi Series A, as hereinbefore mentioned, then to the payment of the principal and interest accrued upon all of the bonds of Series B, hereby secured, and then issued and outstanding, in full, if the said purchase money be sufficient, or, if not, then *pro rata* and without distinction between principal and interest. And in the event of there being and remaining in the hands of said trustee any further surplus or portion of the said trust estate, or the proceeds thereof, after the payment in full of the principal and interest of both series of bonds hereby intended to be secured, then the said trustee, its legal successors and assigns, shall reconvey and retransfer and release or pay over and account for the same to the said party of the first part, its successors and assigns. And it is further understood and provided that instead of making the sale of the property, premises and franchises hereby granted in trust subject to the lien of the mortgage, securing the mortgage bonds hereinbefore particularly mentioned, viz.: The mortgage of the Greensboro Water Company to the Guarantee Trust and (Safe) Deposit Company, dated January 10, 1888, securing the first mortgage bonds in the said mortgage mentioned, the said parties of the second part may, with the consent in writing of the trustee in said last mentioned mortgage, or with the consent of the bondholders secured by the said mortgage or with the assent (172) or authorization of any court of equity which may take jurisdiction of the premises, and determine it to be for the advantage of all parties interested in said property, sell, as above set out, the property, premises and franchises of the said party of the first part mentioned herein, and in the first mortgage prior hereto, being the mortgage of the said Greensboro Water Company, in the manner and form and upon the terms above set out, but particularly free, clear and discharged of the said trust set out and expressed in the said first mortgage of the Greensboro Water Company, as well as of the trust herein expressed, and of the claims of all persons whatsoever. And in such case, the purchase money of that part of the property so sold and embraced and included within the terms of the said mortgage of the Greensboro Water Company obtained at such sale shall be first applied, after the payment of expenses and commissions adjusted and allowed such trustee, to the satisfaction of the just and lawful claims and dues of the holders and owners of the first

mortgage bonds of the Greensboro Water Company, then outstanding and unpaid, and next to the persons and in the order herein provided, in the case of a sale subject to the lien and operation and effect of said first mortgage.

Fourth. And it is hereby further declared and agreed between the parties hereto that in case of the removal by death or otherwise, resignation, refusal or other disability to act of the trustee herein named, it shall be the duty of its substitute or successor to keep and faithfully carry out the trusts herein declared and imposed upon the said party of the second part, and the vacancy so occurring, or if occasion for such vacancy shall occur, it shall be filled by the appointment of a new trustee or trustees by any court in the State of North Carolina, State or Federal, having jurisdiction in the premises, which appointment may be made either upon the application of the party of the first part, giving such previous notice, by publication or other-
(173) wise, to all outstanding bondholders, as the court may direct, or upon the application of one or more outstanding bondholders, giving such previous notice to the party of the first part, and the other bondholders, by publication or otherwise, as the court may direct, and so, from time to time, as vacancies, or occasion for vacancies, shall occur in said trusteeship, the same shall be filled in the manner above provided, and each new trustee thus, from time to time, appointed, shall, upon such appointment, without further act or deed of conveyance, become and be vested fully with, and subject to, all the estate, rights, powers and duties hereby granted to and imposed upon said party of the second part, or upon the former trustee in whose place he shall be appointed.

Fifth. And it is hereby further provided and agreed between the parties hereto that the said party of the second part, the said trustee, its successor or assigns, or any and all of the holders of the bonds hereby intended to be secured, whenever it may appear to said bondholders that said party of the second part is neglecting and delaying to act as the protection of their interest may demand, may, whenever it may seem to it or them proper and desirable for the protection of the interests and estate hereby conveyed in trust, and the more perfect effectuation of the trusts and purposes herein declared, invoke the aid and jurisdiction of any court of equity of the United States, or of any one of the United States which may lawfully assume jurisdiction of the subject matter of the trusts hereby declared and created, and when such court shall have thus, or for any lawful cause whatsoever, assumed jurisdic-

tion in the premises aforesaid, such court may proceed without further consent of the parties of the first part, then is thus hereby finally expressed to order, decree, carry out and execute, by the agency of the trustees herein named, or by the hand of such trustee, representative, commissioners or officers as it shall deem right and proper to appoint for such purposes, the remedies hereby proposed and accorded, as well as such as it may deem to be (174) needful and proper for the protection and benefit of the holders and owners of the bonds and coupons aforementioned, and hereby intended to be secured as aforesaid, it being expressly intended by this clause that such court, whose jurisdiction is so as aforesaid invoked, shall have and exercise full discretion as to the immediate appointment of a receiver upon such application as also to order and enter a final decree for the sale of the property hereby conveyed, when default in the conditions hereof shall be finally matured and concluded pending such receivership.

Sixth. And it is further expressly covenanted and agreed that, at the sale of the aforesaid property, premises, franchises and appurtenances thereof, the said party of the second part, or its successors, or any or all of the holders of the bonds hereby intended to be secured may, personally or by their agent, purchase the property so offered for sale on behalf of the holders of the bonds issued and secured hereunder, upon such terms as may be equitable and just to the holders of said bonds than outstanding, and it is agreed that, after the payment of a sufficient amount of cash to pay the costs of suit and expenses of such sale and of the execution of this trust, the said bonds and over due coupons shall be received in their due order in payment of the purchase money of any property sold at such sale or sales, as equivalent to so much of said purchase money, by and to such purchaser or purchasers.

Seventh. And it is hereby expressly agreed between the parties hereto that the parties of the first part, for itself, its successors and assigns, will and doth hereby waive the benefit of any valuation, appraisement, redemption, stay or exemption laws in force, or which may hereafter be enacted, in any way interfering with or modifying the remedies and obligations hereby granted, covenanted and promised by the said party of the first part.

Eighth. And it is further a condition of these presents that, until default be made by the party of the first part in (175) the due and punctual payment of the principal sums or interest, or any part or parts thereof, called for

and stipulated in said bonds or coupons, or in the performance of any of the covenants or conditions of this deed, the party of the first part shall be, and is, entitled to remain in possession, control, use, management and enjoyment of its water works, rights, property, premises, franchises and interests hereby mortgaged, pledged and conveyed in trust, without let or hindrance or annoyance or interference of the said party of the second part, its successors or assigns, or any one claiming under them.

Ninth. And it is further agreed that the said party of the second part shall have full power and authority to allow the said party of the first part, from time to time, to dispose of such portions of its property, mains, tolls, machinery or other equipments of effects at any time held or acquired for the use of the said party of the first part, as may become worn, unfit, undesirable or unsuited for the use, possession or occupation of said party of the first part, replacing the same with new property, articles and materials of like kind, according to the needs of said party of the first part, which property and effects thus acquired, shall likewise be subject to the operation and lien of these presents, and it is understood between the parties hereto that the power and authority hereby particularly conferred upon the party of the second part, the said trustee, shall be excercised according to its best discretion merely, and said party of the second part is hereby especially authorized to execute any deed, or perform any act which may be required of it, in order to carry out fairly and effectually this provision of this deed.

Tenth. And it is further understood and agreed, and is a condition of these presents, that the party of the second part shall in no way be liable for the act, ommission or neglect of the party of the first part, in respect to the property hereby granted in trust, or in respect to the drafting, execution or recording of this deed, according to the true intent and effect thereof, or by
(176) reason of the act or proceedings of any third party in respect to said property; but said party of the second part shall only be liable and answerable for its own wilful act, neglect or default in the premises, and said party of the second part shall be entitled to be reimbursed and kept free and harmless from all liabilities and expense whatsoever, by reason of any act or attempt on its part to deal with, preserve and take into its own control and management the property hereby granted in trust; and full authority and discretion is hereby granted to said party of the second part to take any steps with regard to said prop-

erty, which it may consider necessary, proper and advantageous for the purpose of protecting and carrying out the trusts hereby imposed upon it, the said party of the second part.

Twelfth. And it is further understood that the recitals herein contained are made on behalf of the party of the first, and the party of the second part assumes no responsibility as to the correctnes of any statement, so as aforesaid set out and expressed in behalf of said party of the first part.

Thirteenth. And the party of the first part hereby covenants and agrees with the said party of the second part, its successors in trust, or assigns, that it will at any time hereafter, upon the request of said party of the second part, or its assigns, execute and deliver, at its own expense, all such other and further conveyances and assurances of the property and security hereby granted or agreed and intended to be granted for the purposes herein mentioned, as may, in the opinion of said party of the second part, or its assigns, be requisite for the more effective performance of the trusts and promises herein declared.

In witness whereof the said Greensboro Water Supply Company, the party of the first part, hath caused these presents to be sealed with its corporate seal hereto affixed, and the same to be signed in its behalf, by its president, James D. Glenn, and by its secretary, William C. Seddon, hereinbefore mentioned, in attestation hereof, and the said party of the second part being the trustee herein named, (177) has also caused its corporate seal to be hereto affixed, and these presents to be signed by Edward Stabler, Jr., its president, and by William M. Byrn, its secretary, in attestation hereof, and in its behalf, as evidence of its acceptance of the trusts and duties hereby imposed and declared upon it.

THE GREENSBORO WATER SUPPLY CO.,
By JAMES D. GLENN,
President of Greensboro Water Supply Company.
WILLIAM C. SEDDON, Secretary.
[Seal of Water Co.]
EDWARD STABLER, President,
WM. M. BYRN, Secretary,
Of the Guardian Security, Trust and Deposit Company of Baltimore City.
[Seal of Trust Co.]

STATE OF NORTH CAROLINA, County of Guilford, } ss:

I, Ed. L. Ragan, C. S. C., hereby certify that James D. Glenn, president of the Greensboro Water Supply Company, director and member of said corporation, appeared before me this day and acknowledged and deposed that he signed his name as president of said body corporate and in its behalf and as its act and deed, and caused its corporate seal to be affixed to said deed, in witness of the due execution of the same by the said body corporate, the party of the first part, in said deed named.

In witness whereof, I have hereunto set my hand and affixed my official seal this 7th day of August, 1896.

[Seal of Guilford County Superior Court.] ED. L. RAGAN, C. S. C. of Guilford County, N. C.

STATE OF MARYLAND, (178) City of Baltimore, } ss:

I hereby certify that before me, the undersigned, personally appeared, this 11th day of September, A. D., 1896, William C. Seddon, secretary of the party of the first part, the Greensboro Water Supply Company, a director and member of said corporation, and acknowledged and deposed that he signed the foregoing deed as secretary of said party of the first part, and in attestation thereof, and caused the corporate seal of said body corporate to be affixed thereto, and at the same time appeared Edward Stabler, Jr., president, and Willian M. Byrn, secretary of the party of the second part, the Guardian Security, Trust and Deposit Company of Baltimore City, in the foregoing deed mentioned, and acknowledged and deposed that they signed their names as president and secretary, and caused the corporate seal of said body corporate to be affixed to said deed, in behalf of said body corporate, and in witness of the due execution by it of the foregoing deed, to and for the purposes concerning it therein set out.

As witness my hand and official seal this 11th day of September, A. D., 1896.

[Notarial Seal] HENRY R. DULANEY, Notary Public.

STATE OF NORTH CAROLINA, Guilford County. }

I, Ed. L. Ragan, Clerk of the Superior Court for said county, do adjudge that the foregoing deed has been properly acknowledged, and that the foregoing certificates of

Ed. L. Ragan, C. S. C. of Guilford Co., No. Ca., and Henry R. Dulaney, Notary Public of Baltimore, Md., duly attested by the official seals, is correct, therefore, let said deed with the certificates be registered.

This 27th day of November, 1896.

ED. L. RAGAN, C. S. C.

Filed for registration November 27th, 1896, at 10:50 (179) o'clock, A. M., and duly recorded in office of Register of Deeds of Guilford County, N. C., in Book 102, page 764 &c.

A. G. KIRKMAN,
Register of Deeds.

[Seal Register of Deeds, Guilford Co.]

Endorsed:

Filed in this office Aug. 5, 1902.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXHIBIT "H."

NORTH CAROLINA, GUILFORD COUNTY. SUPERIOR COURT.

(180) Be it remembered that, on the 11th day of August, 1897, Charlotte J. Gorrell sued out of the Superior Court of Guilford County of North Carolina, a writ in these words, to-wit:

Summons.

NORTH CAROLINA, GUILFORD COUNTY. IN THE SUPERIOR COURT.

Charlotte J. Gorrell against Greensboro Water Supply Company. } Summons for Relief.

State of North Carolina to the Sheriff of Guilford County, Greeting:

You are hereby commanded to summon Greensboro Water Supply Company, the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Guilford, at the Court House in Greensboro, on the 23rd day of August, 1897, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if

it fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the clerk. Herein fail not, and of this summon make due return.

Given under my hand and seal of said court this 11th day August, 1897.

ED. L. RAGAN,
Clerk Superior Court of Guilford Co.

(181) At the return term of the court the said summons was returned with the following endorsement, to-wit:

Charlotte J. Gorrell
against
Greensboro Water Supply Company.

Summons for Relief.

Returnable to August term, 1897, of the Superior Court of Guilford County.

Received August 12th, 1897. Served August 13th, 1897, by delivering to James D. Glenn, president of defendant corporation, a copy of the within summons.

J. A. HOSKINS,
Sheriff Guilford County.

Bond.

We acknowledge ourselves bound unto The Greensboro Water Supply Company, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff, Charlotte J. Gorrell, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hand and seal this 12th day of May, A. D., 1898.

JNO. B. FARISS. [Seal]

On November 10th, 1897, plaintiff files his complaint, which is as follows:

NORTH CAROLINA, Guilford County. } In the Superior Court, August term, 1897.

Charlotte J. Gorrell
against
Greensboro Water Supply Company.

Complaint.

The plaintiff, complaining of the defendant, alleges:

That the City of Greensboro is, and was, at the times (182) hereinafter mentioned and referred to, a corporation duly created and existing under and by virtue of its charter and amendments thereto granted by the General Assembly of North Carolina. And that by and under said charter and the several amendments thereto the commissioners for the said City of Greensboro were authorized and empowered to issue bonds and to use the proceeds arising therefrom for public improvements in said city. Among which was to provide water supplies for the said city either by erecting water works or by contracting with other persons or corporations, to provide a proper system of sewerage for the city, and make all such other public improvements as the health of the citizens and safety of the property might require.

II. That, pursuant to the powers and duties hereinbefore enumerated and set out, the said City of Greensboro did, on the ————, 18—, enter into and make a contract with a corporation duly created and existing under and by virtue of the laws of North Carolina, known as the Greensboro Water Company, whose articles of incorporation and contract by the Legislature of North Carolina, and said contract granted and ceded to said Greensboro Water Company the exclusive right of eminent domain over its streets, alleys, sidewalks, public grounds for the purpose of laying and operating water mains, pipes, hydrants, stands, &c., for the furnishing of said city with pure and wholesome water for the use of citizens, and a force at all times sufficient to protect the inhabitants of said city against loss by fire. And the said water company, in accepting same, undertook on its part certain duties and obligations to the said city and its inhabitants as will more fully appear hereafter.

III. That, after occupying and using said streets and ground of the said city for several years, the said Greensboro Water Company, on the — day of ———, 18—, was put into the hands of a receiver, and shortly thereafter all of its property, rights, privileges and franchises were sold by an order of the United States Circuit Court for the (183) Western District of North Carolina, at which sale the defendant, Greensboro Water Supply Company, became the purchaser by and through one Hugh L. Pope.

IV. That by and under the deed from the commissioners of the Circuit Court to Hugh L. Pope, before mentioned, and by the deed from him to the said Greensboro Water Supply Company, which said deeds were simulta-

neously made, the defendant water company was sold and granted all of the property, real, personal and mixed, and all the rights, title and interest at law and in equity, privileges, powers and franchises belonging to and acquired by said Greensboro Water Company, and also all of the rights and privileges acquired under and by virtue of the acts and concessions and permissions of the corporation of the City of Greensboro or its Board of Aldermen or other city officers or representatives, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, or of any rights of way, easements &c., the property of the Greensboro Water Company.

V. That the Greensboro Water Supply Company is, and was, at the times hereinafter mentioned and referred to, a corporation duly created and existing under and by virtue of the laws of North Carolina, and, as such, succeeded to all of the rights, privileges and powers enjoyed by the said Greensboro Water Company, and at the same time accepted and undertook all of the obligations and duties owed and contracted for by the said water company to the City of Greensboro and its various citizens. And on the — day of ————————, 1896, took possession of and has ever since operated and run the said water works.

VI. That the said contract between the City of Greensboro and the Greensboro Water Company, and the same under which defendant is holding and operating said water works in said city, is hereto attached by copy marked "A," and asked to be taken as a part of this complaint.

VII. That by and under said contract it was stipu-
(184) lated and agreed that the said water company should build, construct, maintain and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure, good and wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use; to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of said city. And to use within the present and future limits of said city any and all streets, avenues, alleys and bridges, and such other public groves as are now or may be hereafter laid out while constructing or repairing such water works, to receive, take, store or purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said water works so as to

afford at all times the most adequate supply for all domestic uses, and the greatest *production* against fire.

VIII. That it was also stipulated and agreed by and under said contract that the said water company should use only first class machinery, pipes, hydrants, valves, pumps &c., in connection with said water works, and that the said works should be complete in all its details with a capacity to furnish one and a half million gallons of water every twenty-four hours against a pressure of two hundred feet head. And should erect a storage water tank whose top water level should be one hundred feet above the surface of the ground at the center of the public square, and to be of a capacity 100,000 gallons of water, and that the same shall be filled by the said water company to its top every day an hour before sundown. And for the extinguishment of fire in said city, the company shall erect a pump house and put therein a pumping engine which shall be kept ready at all times to supply the needed fire pressure.

IX. That it was further stipulated and agreed by and under said contract that the said water company should (185) erect and put in seventy-five hydrants at such places as the city might designate, and for the rents of which said City of Greensboro was to pay them annually $2,875. And in pursuance of such agreement and compliance therewith on the part of the city, the water company did erect, and their successors, the Greensboro Water Supply Company, had in possession and use, at the times hereinafter mentioned, two hydrants, one a hundred and the other about 200 feet distant from plaintiff's store houses which were destroyed by fire on the date hereinafter mentioned.

X. That, by the terms of said contract, it was further stipulated and agreed that the said water company should keep a pressue of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of 100 feet in still air, each stream being taken from one hydrant, and with 100 feet of hose and a one inch ring nozzle, and the said company shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said service.

XI. That said contract was made with the said Greensboro Water Company, and extended to and acquiesced in by there successors, the defendant, Greensboro Water Supply Company, for the use and benefit of all its property

owners and inhabitants, among which was the plaintiff who was a property owner in said city at the times hereinafter referred to, and for several years prior thereto, in common with that of other citizens, which said property was taxed at its full value to raise money with which to pay said hydrant rents.

XII. That on the night of the——day of June, 1897, a fire broke out in a building some thirty feet distant from plaintiff's store-rooms on the south side of South Elm street, in said city, that the fire alarm was at once turned on, and in less than ten minutes thereafter the Greensboro Fire Company arrived at said fire with their hose, fire engine and other appurtenances necessary for the ready extinguishment of said fire. That the said fire company at-
(186) tached its hose, which were in every respect adequate and sufficient for the demands of the occasion, as plaintiff is advised and believed, to the two hydrants above mentioned, one 100 feet from said store-rooms and the other about 200 feet distant, each of which said hydrants were sufficiently near to said store and lot to have afforded water adequate for the ready extinguishment of said fire, if the proper pressure had been on same.

XIII. That, notwithstanding the promptness of the fire company in reaching said fire, and the perfect sufficiency of its equipments to convey the water to same, the defendant, as plaintiff, is advised and believes, persistently, carelessly and negligently refused to furnish said hydrants above described and referred to with a sufficient pressure of water to extinguish said fire, and, by reason of such tortious and negligent conduct on the part of the defendant, the said fire spread from the building in which it originoted and ignited the store-room of the plaintiff.

XIII. That after the fire had spread to and caught on flames the building of the plaintiff, the said fire company, as plaintiff is advised and believes, was still present with its hose, ladders, buckets, engine &c., ready to use its every effort to extinguish same, and while the said fire company had its hose attached to said hydrants sufficiently near, with the proper pressure, to have quickly extinguished same and saved plaintiff's property from burning, the defendant persistently refused, neglected and omitted to have the fire pressure agreed to and required by its contract, and only furnished pressure sufficient to throw a stream ten feet from end of said regulation hose, by carelessly, negligently and wrongfully failing to keep any water in its water tank, or even its hydrants and pipes full, and not having its

pumping engine at work, by reason of which negligent, wrongful and tortious conduct on the part of the defendant, the plaintiff's property was totally destroyed by fire, (187) and by reason of such loss, he has been damaged in the sum of $5,000.00.

XIV. That the said fire originated in an adjacent building to plaintiff's and that the destruction of her property by same was not occasioned by any mistake, carelessness or negligence on her part, but solely on account of the carelesnees, wilful and wanton neglect on the part of the defendant to furnish the hydrants above referred to with the water, which they were required and had obligated themselves to do, and upon their doing of which plaintiff confidently relied.

XV. That, as plaintiff is advised and believes, defendant's failure to provide sufficient water for the extinguishing of said fire was not occasioned by any unavoidable accident or lack of water in the reservoir from which they originally take same, but was the result of a wanton, careless and wilful neglect and disregard for their duties and obligations contracted and owed to the several inhabitants of the City of Greensboro, including the plaintiff.

Wherefore plaintiff demands judgment against the said Greensboro Water Supply Company for the sum of $5,000.00 damages and the costs of this action. And for such other and further relief as the court may deem plaintiff entitled.

BOYD & BROOKS,
Attys. for Plaintiff.

Charlotte J. Gorrell, being duly sworn says that the facts hereinbefore stated of her own knowledge are true, except those matters stated on information and belief and those she believes to be true.

MISS C. J. GORRELL.

Sworn and subscribed before me this 10th day of November, 1897.

WILL P. RAGAN,
Notary Public.

Exhibit "A."

(188) An ordinance authorizing W. W. Taylor, of Philadelphia, Charles S. Hinchman, of Philadelphia, and Fred B. Hubbell, of Baltimore, to construct and maintain and operate water works to supply the City of Greensboro,

North Carolina, and its inhabitants with water, and defining their rights, duties, privileges and powers.

Section 1. That the said Charles S. Hinchman, W. W. Taylor and Fred B. Hubbell be, and they are hereby, empowered to build, construct, maintain, own and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use, to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of said city, subject to the conditions hereinafter named, to use within the present and future limits of said city any and all streets, avenues and alleys and bridges, and such other public grounds as are now or may be hereafter laid out while constructing or repairing such water works, to receive, take, store and purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses and other appliances and attachments necessary or expedient for the proper conducting and carrying on said water works, to cross any street in said city, in laying or extending their pipes, conduits or acqueducts as may be necessary and proper for the distribution of water throughout said city, so as to afford the most adequate supply for all domestic uses and the greatest protection against fire.

Provided, however, that the said grantees aforesaid shall not permanently use any street, avenue, alley, bridge or public grounds above named or occupy the same for any longer time than necessary for the purpose hereinafter indicated, without the permission of the Board of Commissioners, first obtained.

Nor shall the aforesaid grantees permanently injure any street, avenue, alley, bridge or other public grounds above (189) named, but shall restore them to the like condition as it found said streets, avenues, alleys, bridges and public grounds aforesaid, saving the necessary and proper underground work. Provided also that the supply of water hereinbefore named shall continue sufficient for all domestic, sanitary and fire purpose and individual use.

Said grantees are to have the exclusive right to construct, maintain and operate said water works as hereinafter specified, and on the conditions, terms and liabilities set out in this ordinance for the term of twenty years from the date of the completion and acceptance of said water works, and unless such rights shall sooner be terminated as hereinafter provided by purchase or forfeiture, all such

rights and liabilities shall continue for another like period of twenty years, unless said additional term of twenty years be also ended as above provided by purchase or forfeiture.

Sec. 2. The plant of the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works shall be amply sufficient to supply water for the purposes hereinafter mentioned to at least twenty thousand people and to be enlarged and extended to supply a greater actual population, if so required by the Board of Commissioners of the city for the necessities of its inhabitants.

Sec. 3. In case there shall be any disagreement or controversies between the City of Greensboro and the grantees aforesaid in regard to the supply of water or the quality of and quantity thereof or the manner of supplying the same, either party shall have a right to demand in writing of the other, that such manner of dispute, disagreement or controversy be submitted to arbitration, one arbitrator to be chosen by each party, who are to be non-residents of the City of Greensboro and impartial and disinterested persons, and if they disagree they shall have power to call in an umpire, and the award of the two arbitrators, or one arbitrator and the umpire, filed in writing with the parties and signed by them, shall be final and binding upon both par-
(190) ties, and either party shall have the right to have the same specifically performed in a court of equity or other appropriate judicial tribunal and a failure to perform such award in a reasonable time by the aforesaid grantees shall work a forfeiture of its rights under the ordinance.

Provided that if the dispute or controversy be in regard to the quality of the water, the arbitrators and umpire shall be chemists of good reputation.

Sec. 4. The machinery, pipes, hydrants, valves, pumping plant and all other like appurtenances and fixtures used in the water works and in supplying the water are to be first-class in their material and the manufacture thereof.

The grantees aforesaid guarantee and stipulate that
(140) the water supplied shall be pure and wholesome, and that the supply shall be, and continue adequate to the demand for the same by the city or its inhabitants.

Sec. 5. During the progress of the work the grantees aforesaid, shall not unnecessarily obstruct any street, avenue, alley or public ground in laying its pipes or conduits. They will properly repair and make good any gas

or sewer pipes, previously laid, which shall be disturbed, misplaced, or injured by it, and complete each part of work commenced as speedily as possible and restore all the ground disturbed, to as good condition as it was before the work began, and that in the erection, construction and repair of said work in any street, avenue, alley, bridge or other public grounds aforesaid, and removing pavements, curbstones or side walks or other public grounds, and making all necessary excavations for repairs. The grantees aforesaid shall suitably guard and protect the same by enclosures, lamps, watchmen or by the use of any other precaution necessary to prevent injury to persons and property by reason thereof, and said grantees aforesaid shall be liable for all damages for failure to so guard and protect persons and property from injury, when occasioned by its negligence and shall save the city harmless therefrom.

(191) Sec. 6. The water works shall be complete in all its details. The pump house erected shall be of brick, covered with metal and of substantial and neat architecture and, as far as possible, protected from fire. There shall also be in connection with said pump house, near by or as a part thereof, an engineer's dwelling house to be occupied by the engineer or some suitable, intelligent and efficient employee of the grantees who shall, at all hours, be accessible to the call from the city for water.

That these houses, or such one as may be suitable and necessary, may be connected at the expense of the city with the fire department of the city, or other places designated by the city, by telephone, electrical apparatus or any like suitable appliances, by which alarms, calls and communications may be had at all hours with the engineer or employees at said pump houses or dwelling houses aforesaid, and so as to make the communication of threatened danger or want of water or other demand as speedy and as sure as possible.

And the grantees are to keep a suitable, intelligent and efficient employee always at a post where he shall be accessible to the alarms, calls and communications, above named, and shall respond promptly to such alarms, calls and communications.

Sec. 7. The engines and machinery shall be in duplicate and in the beginning fully adequate and adapted to the ultimate requirements and stipulations of this ordinance and contract.

The machinery and appurtenances shall be sufficient to give a capacity of one and a half millions of gallons

(1,500,000) in twenty-four hours against a pressure of two hundred (200) feet head.

The storage water tank from which the supply of water comes immediately shall be at its top water level one hundred feet (100) above the surface of the ground at the center of the public square near the court house and shall be large enough to hold at least one hundred thousand (100,000) gallons of water, and it shall be filled by the grantees aforesaid to its top every day an hour before sun down.

(192) Sec. 8. For the extinguishment of fires the pumping engine shall be kept ready at all times to supply the needed fire pressure.

Sec. 9. The grantees aforesaid shall submit their water works, when finished, to the following as a test of its capacity and efficiency: They agree that the works shall throw six (6) streams of water from six (6) hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred feet (100) of hose and a one-inch ring nozzle.

Sec. 10. All the water mains and pipes used by the grantees aforesaid shall be of the best quality, coated inside and outside with Dr. Angus Smith's patent coal tar varnish, and shall be tested at their place of manufacture to withstand a hydrostatic pressure of three hundred pounds to the square inch.

The distribution of pipes and the location of hydrants shall be as indicated in a map to be furnished by the city subject to be changed at any time by the city at its own expense. The pipes shall be laid and properly embedded in the ground of sufficient depth to prevent freezing. Not in any case to be less than two (2) feet from the surface.

The grantees aforesaid agree to extend the pipes whenever required so to do by the Board of Commissioners on condition that there shall be placed on said extension of piping twelve hydrants to the mile, for the rental of which the city will pay thirty-five dollars ($35.00) each, and which price shall be the rental of all hydrants over seventy-five.

Sec. 11. The grantees aforesaid agree to furnish a better hydrant than the Matthews double opening fire hydrant and to use the Eddy valve.

If the hydrants put in by the grantees shall be unsatisfactory in its operations to the city of Greensboro, it may require the grantees aforesaid to submit the matter to arbitrators as hereinbefore provided, and the grantees agree, if the arbitrators so award, to change the hydrants to the (193) one designated by the arbitrators.

All the hydrants shall be made to fit on any particular hose coupling which shall be indicated in writing, by the City of Greensboro. The indication in writing to be furnished in twenty days from the execution of this contract.

Sec. 12. The city agrees to use the hydrants for the extinguishment of fire only, subject to exceptions hereinafter named, to-wit:

(1) The grantees aforesaid agree to furnish water to the city from the hydrants for street sprinkling, flushing gutters and sewers, fire drill and all other public city uses and purposes (not specified in the schedule of prices and free supplies) at the rate of two-fifths of a cent per barrel or ten (10) cents per one thousand (1,000) gallons.

The grantees aforesaid agree that they will furnish the following supplies free of charge, to-wit:

(1) One telegraph faucet in each of the two public schools.

(2) One fountain in the central portion of the city for the personal use of passers-by, horses from the country and those in draft here, but not to be used by horses led indiscriminately from stables in the city to be watered at this fountain. Nor is water to be carried from the fountain for the use of citizens or others, nor for stock except as above provided.

Sec. 13. The size of the piping shall be as follows, to-wit:

From the pumping station to the south end of South Elm st.,	10 inches.
From this ten-inch pipe on South Elm street to the storage tank,	12 inches.
Along West Market from Elm to Edgeworth street,	8 inches.
Edgeworth street to Cedar street,	6 inches.
Cedar street to College,	6 inches
Elm street to Forbis street,	8 inches.
Forbis street to Gilmer street,	4 inches.
On Cedar street,	4 inches.
(194) On Spring street,	4 inches.
On Edgeworth street,	6 inches.
On Eugene street,	4 inches.
On Ashe street,	4 inches.
On Green street,	4 inches.
On Davie street from Market to N. C. R. R.,	6 inches.
On Davie South of N. C. R. R.,	4 inches.
On Forbis street,	4 inches.

On Percy street,	4 inches.
On Gaston street,	4 inches.
On Sycamore street,	4 inches.
On East Washington street to Forbis street,	6 inches.
On West Washington street,	4 inches.
On New street,	4 inches.
On Asheboro street,	8 inches.
On Depot street,	6 inches.
On Church street,	6 inches.
On Lindsay street,	4 inches.

It is further agreement and understanding of the parties to this contract that if at any time hereafter it shall appear to the city that the foregoing sizes of of piping are inadequate to the supplies needed in those localities that the City of Greensboro shall have the right to indicate its opinion in writing to the grantees aforesaid and request an arbitration to settle the matter. It shall then be the duty of said city and grantees aforesaid to appoint arbitrators as hereinbefore provided, and if they award that the piping shall be increased, it shall be the duty of the grantees aforesaid to change the piping according to the award, and to begin such work within twenty (20) days after the award in writing is furnished to said grantees.

Sec. 14. The grantees aforesaid shall furnish supplies of water to the Greensboro Female College and Bennett Seminary, if desired by them, at the same rates and prices and on the same conditions, terms and regulations as it furnishes supplies to the City of Greensboro and its inhab-
(195) itants.

Sec. 15. If the hydrants get out of order it shall be the duty of the grantees aforesaid to use all the diligence to repair the same and shall forfeit two dollars ($2.00) per day to the City of Greensboro for every day that it fails to perform said duty.

Sec. 16. The grantees aforesaid shall have the right to make all reasonable and just rules and regulations governing the service of water to private consumers as may be necessary for their protection in that behalf and may enforce the observance of the same by cutting off the supply of water or otherwise, and shall have the right at all reasonable hours of the day to have access to the water pipes and metres of any taker; to protect itself from abuse and fraud, or repair or observe or remove the same, and may require all water takers to sign a contract embracing these rules and regulations.

The City of Greensboro shall protect the works and

property of the grantees afaresaid in said city by suitable ordinances.

Sec. 17. The grantees aforesaid shall furnish the City of Greensboro a description and draft of its machinery, appurtenances, fixtures, location and size of piping, hydrants, storage tank, pump houses and other houses and other like information desired by the city to give the Board of Commissioners an intelligent and comprehensive idea of the extent, kind and condition of its whole water works and its connections.

Sec. 18. The grantees aforesaid shall put in gate valves in sufficient numbers to divert and control the water and have as few dead ends as possible.

Sec. 19. The said grantees aforesaid shall constantly, day and night, except from unavoidable accident, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said services, and shall (196) maintain a head of at least seventy (70) feet in the stand pipe or storage tower, except in case of unavoidable accident or when the water is drawn off to cleanse the tank.

Sec. 20. The grantees aforesaid shall furnish water supplies to the city and its inhabitants at the following maximum prices, to-wit:

Tariff of charges per annum, payable semi-annually in advance·

Banks, churches, stores, &c.,	$ 5 00
Bakeries (not less than ($10.00) daily average one barrel flour each,	4 00
Barbers, each chair,	3 00
Baths, private (hot water) each $1.00 extra,	3 00
Baths, public, each includes hotels and boarding houses,	10 00
Smith shops, per fire,	2 50
Building, brick per M., stone, per porch, 5 cents; plastering per square yard ½ cent,	
Hotel, per room,	1 20
Boarding house, room rates (no charge less than $10.00), extra for each boarder, 50 cents,	
Laundries and washer-women,	$8 00 to 20 00
Printing offices—weekly—hands or less (each additional hand, 50 cents),	8 00
Photo. gallery,	$10 00 to 15 00

Residence, for general domestic use—4 rooms or less,	5 00
Residence, for general domestic use—6 rooms or less,	6 00
Residence, for general domestice use—8 rooms or less,	7 00
Residence, for general domestic use—10 rooms or less,	9 00
Residence, for general domestic use—12 rooms or less,	10 00
Residence, for general domestic use—more than 12 rooms,	11 00
Restaurants,	$8 00 to 15 00
Private stable—horse and carriage, each	1 50
Public stables—horse and carriage, each	2 00
Steam boiler, per horse power, up to 15, special,	
Saloons, beer, &c.,	10 00
Pavement washer, including street sprinkler ½ width of street, per each 25 feet front (each add. 25 feet or fraction 2.00),	3 00
Irrifigation—lawns, gardens, &c., per 1,000 sq. ft. or fraction,	1 50
Meter measurement (no charge less than $10.00, per 1,000 gallons, 25 cents; factories, fountains, schools, &c., special rates.	

Any consumer shall have the right to put in a meter and pay for water at the meter rates. The grantees aforesaid shall also have the privilege of putting in a water me-
(197) ter and charging for the water at meter rates.

The water rents charged by said grantees to consumers for domestic and manufacturing purposes shall not exceed the average rates charged in other towns in this State supplied by a like system. The connection between the main and the consumer shall be made at the expense of the consumer and the lowest annual rate for any one consumer shall be five dollars, ($5.00).

Sec. 21. The grantees aforesaid shall begin active operations in good faith on the water works in thirty days from the time this ordinance is passed and accepted by the grantees aforesaid, and the grantees aforesaid shall have the said works completely finished by the 30th day of April, 1888, ready for tests hereinbefore provided for and for the acceptance of the City of Greensboro.

Sec. 22. The grantees aforesaid shall not employ con-

vict labor on the works, and shall, as far as practicable, employ labor from this vicinity.

Sec. 23. The City of Greensboro shall pay for the rental of the seventy-five hydrants, hereinbefore provided for, the sum of two thousand, eight hundred and seventy-five dollars ($2,875.00), payable semi-annually, the first day of July and the 1st day of January, of each year. The first payment of the fraction to be payable the 1st day of July, 1888.

Sec. 24. At the expiration of ten years from the passage of this ordinance, and at each recurring ten years thereafter, the City of Greeensboro shall have the right to purchase the said water works of said grantees at such price or on such terms as may be agreed upon; but in case the parties cannot agree as to the price and terms, the city may give three months notice to the grantees aforesaid of its desire to purchase said water works, and it shall then be the duty of each party to appoint a disinterested arbitrator, not a resident of Greensboro, and these two, if they disagree as to the price and terms of the purchase, shall call in an umpire chosen by them and the award of a majority of the three, or of the two arbitrators, shall be final and binding on the parties, and if the grantees aforesaid refuse to abide by the award, they shall forfeit all their rights under this ordinance as a contract.

The award of the arbitrators shall be in writing, and (198) furnished to each of the parties. The city shall have the option, within ten days after the award is made, to accept or reject the purchase at the price and on the terms awarded by the arbitrators.

If the city declines to purchase, it shall pay the expense of the arbitrators, otherwise to be divided between the parties.

Sec. 25. The city shall be responsible to the grantees aforesaid for any injury negligently done to the hydrants by any of its employees.

Sec. 26. Whenever the words "Grantees aforesaid" are used, they stand for the parties to whom this franchise is granted.

Amended Complaint.

NORTH CAROLINA, Guilford County. } In the Superior Court. February Term, 1898.

Charlotte J. Gorrell against The Greensboro Water Supply Company. } Amended Complaint.

The plaintiff, by an order of court, for his amendment to Section VI. of the complaint heretofore filed in the above entitled action, says:

"That the contract hereto attached purporting to be between W. W. Taylor and others and City of Greensboro, was made by said W. W. Taylor and others, as plaintiff is is advised and believes, for the use and benefit of the Greensboro Water Company, and so accepted by the said city. And that the said contract has been extended to the Greensboro Water Supply Company and the same recog-
(199) nized and acquiesced in at the dates hereinafter mentioned and referred to by both the City of Greensboro and the Greensboro Water Supply Company.

BOYD & BROOKS,
Attys. for Plaintiff.

The plaintiff, C. J. Gorrell, being duly sworn, says that the matters hereinbefore stated are true, except those stated on information and belief, and those she believes to be true.

C. J. GORRELL.

Subscribed and sworn to before me this 9th day of March, 1898.

WILL P. RAGAN,
Notary Public.

Answer.

NORTH CAROLIŒA, GUILFORD COUNTY. IN THE SUPERIOR COURT.

Charlotte J. Gorrell against Greensboro Water Supply Co. } Answer.

The defendant, the Greensboro Water Supply Company, for answer to the allegations made in the several articles of the complaint in the above entitled action, says:

1. The allegations of fact made in the first article of

said complaint: "That by and under said charter, and the several amendmends thereto, the commissioners for the said City of Greensboro were authorized and empowered to issue bonds and use the proceeds arising therefrom for public improvements in said city, among which was to provide water supplies for the said city, either by erecting water works or by contracting with other persons or corporations, to provide a proper system of sewerage for the city, and make all other such improvements as the health of the citizens, and the safety of the property might require," are, on information and belief, denied; and, on the advice of counsel, the legal propositions made and alleged in the said article are also denied, and the defendant is ad-
(200) vised and alleged the fact to be that no statute by way of an original charter, or any amendment thereto, or otherwise, has ever been legally passed by tde General Assembly of North Carolina, in accordance with and as prescribed by the Constitution of said State, authorizing and empowering the said City of Greensboro, or through its commissioners or Board of Aldermen or otherwise, to make such a contract or perform such duties and acts as are set out in said article, and the lack of power of said city in such acts is hereby pleaded and relied upon as a defense to any recovery in this action.

2. That as to the several allegations made in the second article of the complaint, this defendant has no knowlenge nor information sufficient to form a belief, and further answering, this defendant says that the City of Greensboro, through its commissioners or otherwise, had not the power to grant and cede to said Greensboro Water Company, nor any other company nor person nor persons, the exclusive right of eminant domain over its streets, alleys, sidewalks, public grounds, etc., and if it undertook so to do, such action on its part was void, as defendant is advised, and this defendant pleads and relies upon such lack of power as matter of defense to any recovery in this action.

3. The allegations made in the 3rd article of the complaint, that the Greensboro Water Supply Company became the purchaser by and through one Hugh L. Pope, of the property of the Greensboro Water Supply Company, is denied, as, at the time said Pope purchased said property, the Greensboro Water Supply Company was not in existence.

4. That as to whether the deed from the receiver of the Greensboro Water Company to Hugh L. Pope and that from Pope to the defendant were simultaneously

made, and what in law was thereby conveyed, as alleged in the 4th article of the complaint, defendant has no knowledge nor information sufficient to form a belief.

5. That as to the truth of the allegations made in the 5th article of the complaint, that the Greensboro Water (201) Supply Co. succeeded to all of the rights, privileges and powers enjoyed by the said Greensboro Water Company, and, at the same time, accepted and undertook all of the obligations and duties owed and contracted for by the said water company to the City of Greensboro and its various citizens, defendant has not knowledge nor information sufficient to form a belief.

6. That as to the allegations made in the 6th article of the complaint, defendant has not knowledge nor information sufficient to form a belief, and defendant further answering says: That if the City of Greensboro in any way undertook to make and execute said Exhibit "A" as a contract, and as to this defendant has no knowledge nor information sufficient to form a belief, same, as such, was and is, as defendant is advised, void in law, as, it will be seen by reference thereto, it provided that the City of Greensboro shall pay a large sum annually for water, to-wit: $2,875.00, through a period of many years and no authority was ever given said city nor its Commissioners or Board of Alderman to make such contract by any act of the General Assembly of North Carolina, legally passed as to its readings and entries on the Journals of the respective Houses, nor was said city, its Commissioners or Board of Alderman, empowered to make such contract by vote of the qualified voters of the said City of Greensboro, as required by the Constitution and laws of North Carolina, and any and all effort or attempt on the part of said City of Greensboro, its Commissioners or Board of Alderman, was in excess of its or their power, and any and all action in that behalf was *ultra vires* and the same is hereby pleaded and relied upon as matter of defense to any and all recovery in this action; and this defendant is advised that the plaintiff cannot recover, as the basis of her claim is through said Exhibit "A," according to her own contention.

7. The defendant, answering the several allegations made in the 7th article of complaint, says: That the execution and validity of said alleged contract are hereby de- (202) nied as hereinafter set out, and that the contents and legal effect of Exhibit "A" show and speak for themselves, and all allegations in said article 7th as to the con-

tents and legal effect of said Exhibit "A" other than as shown thereby, are denied.

8. Defendant, for answer to the several allegations made in the 8th article of the complaint, says: That the execution and validity of said alleged contract are hereby denied, as hereinbefore set out, and that the contents and legal effect of Exhibit "A" and alleged contract, show and speak for themselves, and all allegations in said article 8th as to the contents and legal effect of said Exhibit "A" other than as shown thereby, are denied.

9. Defendant, answering the several allegations made in the 9th article of the complaint, says: That the execution and validity of said alleged contract, Exhibit "A," are denied, as hereinabove set out, and that the contents and legal effect of said Exhibit "A" are shown and speak for themselves, and all allegations in said article 9th as to the contents and legal effect thereof other than are shown thereby, are denied.

10. The defendant, answering the several allegations made in the 10th article of the complaint, says: That the execution and validity of said alleged contract Exhibit "A" are denied, as hereinbefore set out, and that the contents and legal effect of said Exhibit "A" are shown and speak for themselves, and all allegations in said article 10th, as to the contents and legal effect thereof other than are shown thereby, are denied.

11. The allegations of fact made in the 11th article of the complaint are, on information and belief, denied, and the legal conclusions and propositions therein made are also denied on the advice of counsel.

12. That as to the allegations made in the 1st 12th article of the complaint, defendant has no knowledge nor information sufficient to form a belief.

13. The several allegations made in the 2nd 12th article of the complaint are denied.

(203) 14. The allegations made in the 13th article of the complaint are denied.

14. The allegations made in the 14th article of the complaint to the effect that the distruction of the plaintiff's property was "solely on account of the careless, wilful and wanton neglect on the part of the defendant to furnish the hydrants above referred to with the water which they were required and had obligated themselves to do, and upon

their doing of which plaintiff confidently relied," are denied.

16. The several allegations of article 16th of the complaint are denied.

17. That as to the allegations made in the amended complaint, defendant has no knowledge nor information sufficient to form a belief.

The defendant, further answering the said complaint, and not waiving the foregoing answer, but relying upon the same as if here and now fully related, says on information and belief:

That the plaintiff was fully insured and protected by a certain policy of insurance on her said buildings from loss by fire, and that under said policy plaintiff has collected a large sum of money, to-wit: ———— dollars, a sum sufficient to fully protect, reimburse and indemnify her from all loss or damage she sustained by reason of said fire.

For a further defense, relying upon the foregoing, defendant, on information and belief alleges: That the plaintiff has been fully protected and reimbursed for all loss she sustained by said fire by the one or more insurance companies under one or more insurance policies plaintiff had on her building at the time of fire, and that this action is prosecuted, not for the benefit of the plaintiff, but for the benefit of the said insurance company or companies, and that the plaintiff is not the real party at interest.

For a further defense, says that the acts complained of (204) as having been done, committed, omitted by defendant were not the proximate cause of the injury complained of, as defendant is advised and avers the fact to be.

Wherefore defendant prays that this action be dismissed, and that the defendant go without day and recover its costs.

KING & KIMBALL,
Attys. for Deft.

STATE OF MARYLAND,
Baltimore City. }

W. C. Seddon, being first duly sworn, says that he is secretary of defendant, Greensboro Water Supply Company, and that the foregoing answer is true, except as to matters stated therein upon information and belief, and as to those he believes them to be true.

W. C. SEDDON.

Subscribed and sworn to before me this the 14th day of August, 1900.

[Notarial Seal] MURRAY RANSOM,
Notary Public.

NORTH CAROLINA, Guilford County. } In the Superior Court, February Special Term, 1900.

Charlotte J. Gorrell
vs.
The Greensboro Water Supply Co.

This cause coming on for trial, and being heard before his Honor Judge W. A. Hoke, and a jury, and the following issues having been answered by said jury, as hereinafter appears, to-wit:

1. At the time of the distruction by fire of plaintiff's property, was defendant under a valid and binding contract with the City of Greensboro to furnish a water supply (205) in accordance with plans and specifications in quantities, and for purposes set out and described in complaint? Answer. No.

2. At such times had defendant undertaken to furnish the City of Greensbor supply water, according to such plans and specifications, etc., by an agreement as set out and described in complaint, which said agreement was invalid as a contract because in contravention of State Constitution? Answer. Yes.

3. At such times was said defendant engaged in an effort to perform stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. Yes.

4. Did the defendant wrongfully and negligently fail to furnish a proper water supply, by reason of which plaintiff's houses were destroyed by fire, and damage done to her property? Answer. Yes.

5. What damage has plaintiff sustained by reason of such wrong and injury? Answer. $5,000.00.

It is therefore, on motion of A. L. Brooks, attorney for plaintiff, ordered, adjudged and decreed that the plaintiff, Charlotte J. Gorrell, recover of the defendant, Greensboro Water Supply Company, the sum of five thousand dollars damages for the wrongful, negligent and tortious injury

done her property, and the costs of this action to be taxed by the clerk of this court.

W. A. HOKE, Judge, presiding.

STATE OF NORTH CAROLINA, }
Guilford County. }

I, John J. Nelson, Clerk of the Superior Court for said county, do hereby certify that the foregoing is a true copy of the judgment in the case, Charlotte J. Gorrell against The Greensboro Water Supply Co., as same appears on record and file in this office. Witness my hand and official seal this 9 day of Mch., 1901.

[Seal] JOHN J. NELSON,
Clerk Superior Court.

TRANSCRIPT OF JUDGMENT FROM THE JUDGMENT DOCKET OF GUILFORD SUPERIOR COURT.

(206) GUILFORD COUNTY—IN THE SUPERIOR COURT.

Charlotte J. Gorrell, Plaintiff,
vs.
The Greensboro Water Supply Co., Defendant. } Transcript of Judgment.

At a Superior Court held for the County of Guilford, at the Court House in Greensboro, the 5th day of Feb'y, 1900, before his Honor Judge W. A. Hoke, judgment was rendered in favor of Charlotte J. Gorrell, the above-named plaintiff, against The Greensboro Water Supply Co., the defendant, for the sum of five thousand dollars, with interest on five thousand dollars from the 5th day of February, 1900, till paid, and cost of suit, $ amount to be furnished when papers found.

GUILFORD COUNTY, } *ss*:

I, Jno. J. Nelson, Clerk of the Superior Court of said county, do hereby certify that the foregoing is a true and perfect transcript from the judgment docket in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in Greensboro, the 9th day of March, 1901.

[Seal] JNO. J. NELSON,
Clerk Superior Court.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXHIBIT "K."

NORTH CAROLINA, } Superior Court.
(207) Guilford County. }

Charlotte J. Gorrell
vs.
Greensboro Water Supply Co.

In consideration of thirty-five hundred dollars, $3,500.00, to me paid by the Guardian Trust and Deposit Company of Baltimore, Maryland, a receipt of which is hereby acknowledged, I have bargained and sold, and do by these presents bargain, sell, transfer and convey unto the said Guardian Trust and Deposit Company a certain judgment recovered by me against the defendant, the said Greensboro Water Supply Company, in the above entitled action, and now docketed in the Superior Court of Guilford County, without recourse on me, with right in the said Guardian Trust and Deposit Company to control the said judgment and action wherein said judgment was taken, and to receive and collect and receipt for the amount recovered and due by said judgment, and for this purpose may proceed in and have the use of my name, provided I am in no way to be responsible for any costs or damages, but all such so accrued to be paid by the Guardian Trust and Deposit Co.

I am the owner of this judgment, and same is unincumbered; and I hereby agree to make the necessary transfer on the court docket when demanded.

In witness whereof I have hereunto set my hand and seal on this the 7th day of December, 1900.

MISS CHARLOTTE J. GORRELL, [Seal]

Witness:

A. L. BROOKS.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

CREDITOR'S EXHIBIT No. 1.

UNITED STATES COURT FOR THE WESTERN DISTRICT OF
(208) NORTH CAROLINA. IN THE CIRCUIT COURT.

The Guardian Trust and Deposit Co. against The Greensboro Water Supply Co. } Claim of Helen G. Brown.

Pursuant to an order made in the above entitled cause, and in answer to the advertisement made by Clement Manly, Esq., referee, that all parties having claims against the defendant herein should present the same to him on Thursday, April 11th, 1901, at 2 o'clock, M., Helen G. Brown, a creditor of said defendant, hereby presents a certified copy of a judgment obtained by her against said defendant in the Superior Court of Guilford County. Said copy of judgment is hereto attached. Said judgment was obtained at a special term of said Superior Court of Guilford County, begun and held for said county on Jan'y 14th, 1901, the summons in said cause having been issued on Aug. 7th, 1897, and duly served on the defendant on August 10th, 1897, whereby said court obtained jurisdiction prior to the bringing of this action in the Circuit Court of the United States. Said Helen G. Brown is advised and alleges that the same is a judgment for a tortious injury to property, and, being a judgment in tort, that there is a lien upon all the property and earnings of the said Greensboro Water Supply Company which is a prior lien to all mortgages executed upon said property or earnings, by virtue of Sec. 1255 of the Code of North Carolina. She, therefore, asks that the same be declared a prior lien by said referee.

HELEN G. BROWN,
By her attorneys,
L. M. SCOTT, and
JOHN N. WILSON.

STATE OF NORTH CAROLINA, (209) Guilford County. } In the Superior Court.

Helen G. Brown against The Greensboro Water Supply Company. } Summons for Relief.

State of North Carolina to the Sheriff of Guilford County, Greeting:

You are hereby commanded to summon the Greensboro Water Supply Company, the defendant above named, if it

be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Guilford, at the Court House in Greensboro, on the 23rd day of August, 1897, and answer the complaint, which will be deposited in the office of the clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint and the cost of this action to be taxed by the clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court this 7th day of August, 1897.

ED. L. RAGAN,
Clerk Superior Court of Guilford Co.

Endorsed on back as follows:

"We acknowledge ourselves bound unto the Greensboro Water Supply Company, the defendant in this action, in the sum of $200, to be void, however, if the plaintiff, Mrs. Helen G. Brown, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this — day of ———, A. D., 189–.

HELEN G. BROWN, [Seal]
SAMPLE S. BROWN, [Seal]

(210) Helen G. Brown against The Greensboro Water Supply Company. Summons for relief. Returnable to August Term, 1897, of the Superior Court of Guilford County. Received August 10, 1897. Served Aug. 10, 1897, by delivering to James D. Glenn, president of defendant company, a copy of within summons. J. A. Hoskins, Sheriff Guilford County. Fees 60c. L. M. Scott, J. N. Wilson, pl'ffs attorneys."

GUILFORD COUNTY, North Carolina. } In the Superior Court.

Helen G. Brown
against
Greensboro Water Supply Company. } Complaint.

The plaintiff complains of the defendant and alleges:

(1) That the City of Greensboro is, and was, at the time hereinafter mentioned and referred to, a corpora-

tion duly created and existing under and by virtue of its charter and amendments thereto granted by the General Assembly of North Carolina, and that by and under said charter and the several amendments thereto the commissioners for the said City of Greensboro were authorized and empowered to issue bonds and to use the proceeds arising therefrom for public improvements in said city, among which was to provide water supplies for the said city, either by erecting water works or by contracting with other persons or corporations for the same, to provide a proper system of sewerage for the city, and make all such other public improvements as the health of the citizens and safety of the property might require.

2. That, pursuant to the powers and duties hereinbefore enumerated and set out, the said City of Greensboro did, on the ————, 18—, enter into and make a contract with a corporation duly created and existing under and by virtue of the laws of North Carolina, known as the Greens-
(211) boro Water Company the exclusive right of eminent domain over its streets, alleys, sidewalks, public grounds, etc., for the purpose of laying and operating water mains, pipes, hydrants, stand, pipes, etc., for the furnishing of said city with pure and wholesome water for the use of its citizens, and a force at all times sufficient to protect the inhabitants of said city against loss by fire, and the said water company, in accepting same, undertook on its part certain duties and obligations to the said city and its inhabitants as will more fully appear hereafter.

3. That, after occupying and using said streets and ground of the said city for several years, the said Greensboro Water Company, on the — day of ———, 189—, was put into the hands of a receiver, and shortly thereafter all of its property, rights, privileges and franchise were sold by an order of the United States Circuit Court for the Western District of North Carolina, at which sale the defendant, Greensboro Water Supply Company, became the purchaser by and through one Hugh L. Pope.

(4) That by and under the deed from the commissioners of the Circuit Court to Hugh L. Pope, before mentioned, and by the deed from him to the said Greensboro Water Supply Company, which said deeds were simultaneously made, the defendant water supply company was sold and granted "all of the property, real, personal and mixed, and all the rights, titles and interest at law and in equity, privileges, powers and franchises belonging to and acquired by said Greensboro Water Company, and also all of the

rights and privileges acquired under and by virtue of the acts and concessions and permissions of the corporation of the City of Greensboro or its Board of Aldermen or other city officers or representatives, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, or of any rights of way, easements etc., the property of the Greensboro Water Company.

(212) (5) That the Greensboro Water Supply Company is, and was at the times hereinafter mentioned and referred to, a corporation duly created and existing under and by virtue of the laws of North Carolina, and, as such, succeeded to all of the rights, privileges and powers enjoyed by the Greensboro Water Company, and at the same time accepted and undertook all of the obligations and duties owed and contracted for by the said water company and its citizens. And on the — day of ————————, 189–, took possession of and has ever since operated and run the said water works.

(6) That the said contract between the City of Greensboro and the Greensboro Water Company, and the same under which the defendant is holding and operating said water works in said city, is hereto attached by copy marked "A," and asked to be taken as a part of this complaint.

(7) That by and under said contract it was stipulated and agreed that the said water company should build, construct, maintain and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure and wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use; to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of said city, and to use within the present and future limits of said city any and all streets, avenues, alleys and bridges, and such other public grounds as are now or may be hereafter laid out while constructing or repairing such water works, to receive, take, store or purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water tanks, pumps, pump houses and other appurtenances and attachments necessary or expedient for the proper constructing and carrying on said water works so as to afford at all times the most adequate supply for all domestic uses, and the greatest protection against fire.

(8) That it was also stipulated and agreed by and under said contract that the said water company should use only first class machinery, pipes, hydrants, valves,

pumps etc., in connection with said water works, and that (213) the said works should be complete in all its details with a capacity to furnish one and one-half million gallons of water every 24 hours against a pressure of 200 feet head. And should erect a storage water tank whose top water level should be 100 feet above the surface of he ground at the center of the public square, and to be of a capacity 100,000 gallons of water, and that the *square* shall be filled by the said water company to its top every day an hour before sundown, and for the extinguishment of fire in said city, the company shall erect a pump house and put therein a pumping engine which shall be kept ready at all times to supply the needed fire pressure.

(9) That it was further stipulated and agreed by and under said contract that the said water company should erect and put in 75 hydrants at such places as the city might designate, and for the rents of which said City of Greensboro was to pay them annually $2,875, and in pursuance of such agreement and in compliance therewith on the part of the said city, the said water company did erect, and their successors, the Greensboro Water Supply Company, had in possession and use, at the times hereinafter mentioned, two hydrants, one ——— and the other about —— feet distant from plaintiff's store house which was destroyed by fire on the date hereinafter mentioned.

10. That, by the terms of said contract, it was further stipulated and agreed that the said water company shou'd keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of 100 feet in still air, each stream being taken from one hydrant, and with 100 feet of hose and a one inch ring nozzle, and the said company shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire services, and should keep them in good order for said service.

11. That the contract hereto attached, purporting to be between W. W. Taylor and others and the City of (214) Greensboro, was made by the said W. W. Taylor and others, as the plaintiff, is advised and believes, for the use and benefit of the Greensboro Water Company and so accepted by the said city, and that the said contract has been extended to the Greensboro Water Supply Company, and the same recognized and acquiesced in at the dates herein mentioned and referred to, by both the City of Greensboro and the Greensboro Water Supply Company;

that said contract was made with the said Greensboro Water Company, and extended to and acquiesced in by their successor, the Greensboro Water Supply Company, for the use and benefit of the property owners and inhabitants of the City of Greensboro, one of which was the plaintiff who was a property owner in said city at the times hereinafter referred, and for several years prior thereto, which said property was taxed at its full value to raise money with which to pay said hydrant rents.

(12) That on the morning of the 29th day of May, 1897, a fire broke out some feet distance from plaintiff's store-house on the west side of South Elm street, in said city, in the property of the Eagle Foundry Company, located in the rear of the plaintiff's store on south Elm street, that the fire alarm was at once turned on, and in less than ten minutes thereafter the Greensboro Fire Companies arrived at said fire with their hose, fire engine and other appliances necessary for the ready extinguishment of said fire, that the said fire company attached its hose, which were in every respect adequate and sufficient for the demands of the occasion, as plaintiff is advised and believes, to the two hydrants above mentioned, one —— feet from said store-house and the other about ——feet distant, each of which said hydrant were sufficiently near to said store-house to have afforded water adequate for the ready extinguishment of said fire, if the proper pressure had been on the same.

(13) That, notwithstanding the promptness of the fire company in reaching said fire, and the perfect sufficiency of its equipments to convey the water to same, the defendant, as plaintiff, is advised and believes, persistently and care-
(215) lessly and negligently refused to furnish said hydrants above described and referred to with a sufficient pressure of water to extinguish said fire, and, by reason of such tortious and negligent conduct on the part of the defendant, the fire spread from the building in which it originated and ignited the store-house of the plaintiff.

(14) That after the fire had spread and caught said building of the plaintiff, the said fire company, as plaintiff is advised and believes, was still present with its hose, ladders, engine etc., ready to use its every effort to extinguish the same, and while the said fire company had its hose attached to said hydrants sufficiently near, with the proper pressure, to have quickly extinguished the said fire and saved plaintiff's property from burning, the defendant persistently refused, neglected and omitted

to have the fire pressure agreed to and required by its contract, and only furnished pressure sufficient to throw a stream ten feet from said hose, by carelessly, negligently and wrongfully failing to keep sufficient water in its water tank, or in its hydrants and pipes full, and not having its pumping engine at work, and by carelessly and negligently allowing its pipes and hydrants to be filled with mud, by reason of which negligent, wrongful and tortious conduct on the part of the defendants, the plaintiff's said store-house and property was consumed and destroyed by fire, and by reason of such loss, the plaintiff has been damaged in the sum of six thousand dollars.

(15) That the said fire originated in the Eagle Foundry building in the rear of plaintiff's store and that the destruction of plaintiff's property by fire was not occasioned by any mistake, carelessness or negligence on her part, and was not due to any unavoidable accident or to the fact that the defendant company was, at said time, cleaning out its water tank and mains or pipes, but said defendant company's failure to furnish sufficient water supply was due solely to its own negligence, as plaintiff is informed and believes, and to its failure and neglect to furnish the hydrants above referred to with the water, which they were (216) required and had obligated themselves to furnish, and upon their doing of which the plaintiff confidently relied

(16) That, as plaintiff is advised and believes, defendant's failure to furnish sufficient water for the extinguishing of said fire was not occasioned by any unavoidable accident or lack of water in the reservoir from which they originally take the same, but was the result of a wanton, careless and wilful neglect and disregard of their duties and obligations contracted and owed to the several inhabitants of the City of Greensboro, including the plaintiff.

Wherefore plaintiff demands judgment against the said Greensboro Water Supply Company for the sum of six thousand dollars as damages said wrong and injury and the costs of this action to be taxed by the clerk.

And for such other and further relief as the court may deem the plaintiff justly entitled to.

L. M. SCOTT,
JOHN N. WILSON,
Attys. for Plaintiff.

Helen G. Brown, the plaintiff, being duly sworn, says

that the facts set forth in the foregoing complaint are true of her own knowledge, except those set forth upon information and belief, and those she believes to be true.

HELEN G. BROWN.

Subscribed and sworn to before me this, the 24th day of October, 1900.

[Seal]

WM. R. LAND,
Notary Rublic.

(217) NORTH CAROLINA, Guilford County. } In the Superior Court.

Helen G. Brown
vs.
The Greensboro Water Supply Company. } Answer.

The defendant, for answer to the allegations made in the several articles of the complaint, says:

(1) That the allegations contained in the second article of the complaint as to the contract, a copy of which the plaintiff purports to attach to her complaint, inconsistent with said contract, and not therein contained, are denied.

(2) That the allegations of the 7th article of the complaint as to the provisions of the contract, to-wit: Exhibit "A," which are inconsistent with and not born out by reference thereto, are denied.

(3) That the allegations of the 8th article of the complaint as to the contents and provisions of the contract, inconsistent with said contract and not borne out and sustained thereby, are denied.

(4) That the allegations of the 10th article of the complaint as to the contents and provisions of Exhibit "A," which are inconsistent therewith and not borne out by reference thereto, are denied.

(5) That as to the allegations of the 11th article of the complaint "that the plaintiff was a property owner in said city at the times hereinafter referred to and for several years prior thereto, which said property was taxed at its full value to raise money with which to pay said hydrants rents," this defendant has not knowledge nor information sufficient to form a belief.

(6) That as to the allegations made in the 12th article of the complaint, other than that there was a fire

(218) about the time mentioned, this defendant has no knowledge nor information sufficient to form a belief.

7. The allegations of the 13th article of the complaint are denied.

(8) The allegations of the 14th article of the complaint are, on information and belief, denied.

(9) The allegations of the 15th article of the complaint are, on information and belief, denied.

(10) The allegations of the 16th article of the complaint are denied.

BYNUM & BYNUM and
KING & KIMBALL,
Attys for Def't.

Jas. D. Glenn, being first duly sworn, says that he is president of the defendant company, and that the facts set forth in the foregoing answer are true of his own knowledge, except those stated on information and belief, and as to those he believes them to be true.

JAS. D. GLENN.

Sworn and subscribed to before me this 12th day of Jany., 1901.

[Seal] A. B. KIMBALL, N. P.

NORTH CAROLINA,
Guilford County.

I, John J. Nelson, Clerk of the Superior Court of said county, do hereby certify that the foregoing is a true copy of the summons, complaint and answer in in the case Helen G. Brown against The Greensboro Water Supply Company, as same appears on file in this office. Witness my hand and official seal this the 10th day of April, 1901.

JOHN J. NELSON,
Clerk Superior Court.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

GUILFORD COUNTY, } In the Superior Court,
(219) North Carolina, } Special Term, January, 1901.

Helen G. Brown
against
Greensboro Water Supply Company.

This action coming on for trial, and being heard before his Honor Judge Timberlake, and a jury, and the following issues having been submitted to and answered by the jury, to-wit:

1st. Was the plaintiff, Helen G. Brown, the owner of the store house and property which was destroyed by fire as alleged in the complaint? Answer. Yes.

2nd. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, as set out and described in the complaint, in the quantity and for the purposes set out? Answer. Yes.

3rd. At such time was the said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. Yes.

4th. Did the defendant fail to perform its duty under said agreement by means of which plaintiff's house and property were destroyed by fire and damage done her. Answer. Yes.

5th. Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

6th. What damage, if any, did the plaintiff sustain in consequence thereof? Answer. $3,000.00.

It is now, therefore, on motion of the counsel for the plaintiff, ordered, adjudged and decreed that the plaintiff, (220) Helen G. Brown, do recover of the defendant, the Greensboro Water Supply Company, the sum of three thousand dollars as damages, together with the costs of this action to be taxed by the clerk.

E. W. TIMBERLAKE,
Judge Presiding.

NORTH CAROLINA, Guilford County, } In the Superior Court.

I, John J. Nelson, Clerk of the Superior Court for said county, do hereby certify that the foregoing is a true copy of the judgment rendered at the January Special Term of this court in the case of Helen G. Brown against The Greensboro Water Supply Company, as same appears on record and file in this office.

Witness my hand and official seal this the 8th day of March, 1901.

[Seal] JOHN J. NELSON,
Clerk Superior Court.

CREDITOR'S EXHIBIT No. 2.

To Clement Manly, Esq , Special Master & Auditor.

(221) Pursuant to a notice issued by you as special master and auditor in a cause entitled Guardian Trust and Deposit Company, complainant, against The Greensboro Supply Company, defendant, pending in the United States Circuit Court for the Western District of North Carolina, at Greensboro, notifying all parties interested in the funds of said defendant company's property or holding claims or demands against them to appear at the office of the clerk of the United States Court, at Greensboro, the 8th day of April, 1901, at 12 o'clock, and present same, we, therefore, respectfully submit the following: Attached hereto is a copy of a judgment rendered by the Superior Court of Guilford County, N. C., at a special term thereof held by Timberlake, Judge, in the month of January, 1901, in a cause therein pending entitled A. M. Scales, assignee of A. A. Hinkle and A. A. Hinkle, which was instituted prior to the appointment of receivers herein.

Greensboro Water Supply Company.

wherein the plaintiff recovered of the defendant the said judgment for thirty-two hundred and fifty dollars ($3,250.00) damage for the tortious and negligent injury done the plaintiff's property. The attached judgment, as we are advised and believe, is, by virtue of Section 1255 of the Code of North Carolina, a first lien upon all the property of the defendant water company, and, as such, is therefore entitled in the distribution of the assets to be first paid before the bonds, mortgages or other liabilities of the said company are satisfied, and is also a first lien upon the said water plant and its earnings. In making

proof of this claim, we do hereby expressly reserve all rights, title and interest which we now have or may hereafter acquire under and by virtue of the laws of the State of North Carolina, the decisions of its courts. This 9th day of March, 1901.

A. M. SCALES,
Assignee of A. A. Hinkle
and A. A. HINKLE,
A. L. BROOKS &
SCALES & SCALES,
Att'ys for Scales, assignee, & A. A. Hinkle.

NORTH CAROLINA, } In the Superior Court.
(222) Guilford County. } Special Term, January, 1901.

A. M. Scales, Assignee of A. A. Hinkle, and A. A. Hinkle,
vs.
The Greensboro Water Supply Co. } Judgment.

This cause coming on to be heard before his Honor Judge E. W. Timberlake, and a jury, at the Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of plaintiff's property by fire, has the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract and set out and described in the complaint in the quantity and for the purposes set out? Answer. "Yes."

2. At such a time was the defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for the year the price stipulated in said agreement for furnishing water? "Water."

3. Did the defendant company fail to comply with its contract? Answer. "Yes."

4. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

5. What damages, if any, has the plaintiff sustained? Answer. "$3,250.00."

Wherefore, it is, on motion of counsel for the plaintiff, ordered, adjudged and decreed that plaintiffs recover

of the defendant, Greensboro Water Supply Company, three thousand, two hundred and fifty dollars ($3,250.00) damage, and for the costs of this action to be taxed by the clerk.

(Signed) E. W. TIMBERLAKE,
Judge Presiding.

(223) I, John J. Nelson, Clerk of the Superior Court of Guilford County, do hereby certify that the foregoing is a true and exact copy of the judgment in the above entitled cause which is on record in this office.

Witness my hand and official seal this the 22nd day of February, 1901.

[Seal] JNO. J. NELSON, C. S. C.

Endorsed:

Filed in this office Aug. 5, 1901.

SAM'L L. TROGDON, Clerk.

CREDITORS' EXHIBIT No. 3.

To Clement Manly, Esq., Special Master & Auditor.

(224) Pursuant to a notice issued by you as special master and auditor in a cause entitled Guardian Trust and Deposit Company, complainant, against The Greensboro Water Supply Company, defendant, pending in the United States Circuit Court for the Western District of North Carolina, at Greensboro, notifying all parties interested in the funds of said defendant company's property or holding claims or demands against them to appear at the office of the Clerk of the United States Court, at Greensboro, the 8th day of April, 1901, at 12 o'clock, and present same, we, therefore, respectfully submit the following: Attached hereto is a copy of a judgment rendered by the Superior Court of Guilford County, N. C., at a special term thereof held by Timberlake, Judge, in the month of January, 1901, in a cause therein pending entitled A. M. Scales, assignee of Hodgin, Pegram & Gompany and G. S. Hodgin, W. W. Mendenhall and C. D. Wilson, trading as Hodgin, Pegram & Co., against The Greensboro Water Supply Company, wherein the plaintiff recovered of the defendant the said judgment for eighteen hundred dollars ($1,800.00) damage for the tortious and negligent injury done the plaintiff's property, which suit was instituted prior to the appointment of the receivers herein. The attached judgment, as we are advised and believe, is, by virtue of section 1255 of the Code of North Carolina, a first lien upon all the property of the defendant water company, and as such, is there-

fore entitled in the distribution of the assets to be first paid before the bonds, mortgages or other liabilities of the said company are satisfied, and is also a first lien upon the said water plant and its earnings. In making proof of said claim we do hereby expressly reserve all rights, title and interest which we now have or may hereafter acquire under and by virtue of the laws of the State of North Carolina and the decisions of its courts.

(225) This 9th day of March, 1901.

A. M. SCALES,
Assignee of Hodgin, Pegram & Co., & G. S. Hodgin,
W. W. Mendenhall & C. D. Wilson, trading, &c.
By A. L. BROOKS,
SCALES & SCALES,
Attys. for Claimants.

NORTH CAROLINA, Guilford County. } In the Superior Court. Special Term, January, 1901.

A. M. Scales, Assignee of Hodgin, Pegram & Co. and G. S. Hodgin, W. W. Mendenhall and C. D. Wilson, trading as Hodgin, Pegram & Company,
vs.
The Greensboro Water Supply Co. } Judgment.

This cause coming on to be heard and being heard before his Honor Judge E. W. Timberlake, and a jury, at the Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of plaintiff's property by fire, has the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract and set out and described in the complaint in the quantity and for the purposes set out? Answer. "Yes."

2. At such time was the defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. "Yes."

3. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

4. What damages, if any, has the plaintiff sustained? Answer. "$1,800.00."

(226) It is, therefore, on motion of counsel for the plaintiff, ordered, adjudged and decreed that plaintiffs recover of the defendant, Greensboro Water Supply Company, eighteen hundred dollars damages, and for the costs of this action to be taxed by the clerk.

(Signed) E. W. TIMBERLAKE,
Judge Presiding.

I, John J. Nelson, Clerk of the Superior Court of Guilford County, do hereby certify that this is a true and exact copy of the judgment in the above entitled cause as appears upon the records in this office.

Witness my hand and official seal this the 22nd day of February, 1901.

[Seal] JNO. J. NELSON, C. S. C.

Endorsed:

Filed in this office Aug. 5, 1901.

SAM'L L. TROGDON, Clerk.

CREDITOR'S EXHIBIT No. "4."

To Clement Manly, Esq., Special Master and Auditor.

(227) Pursurnt to a notice issued by you as special master and auditor in a cause entitled Guardian Trust and Deposit Company, complainant, against the Greensboro Water Supply Company, defendant, pending in the United States Circuit Court for the Western District of North Carolina, at Greensboro, notifying all parties interested in the funds of said defendant company's property or holding claims or demands against them to appear at the office of the clerk of the United States Court, at Greensboro, on the 8th day of April, 1901, at 12 o'clock, and present them, we, therefore, respectfully submit the following: That about two years ago and prior to the appointment of a receiver by the United States Court in the above entitled matter, the Southern Stock Mutual Insurance Company, a corporation chartered under the laws of North Carolina with its office in Greensboro and doing business here, instituted and sued out of the Superior Court of Guilford County summons against the Greensboro Water Supply Company for the purpose of recovering two certain claims by them held against the said water company, the payment of which had been refused by the said water company. The amount

of the two several claims referred to is $2,500.00 each and arose out of the following transactions, to-wit: prior to and in the month of June, 1897, the said insurance company had entered into a binding contract of insurance with one Mrs. Helen G. Brown and Miss Charlotte J. Gorrell to pay unto each of them the sum of $2,500.00 in the event of the destruction by fire of their two several stores situated in Greensboro, on south Elm street. That thereafter, to-wit: about the — day of June, 1890, the said two storehouses were burned by the same fire and the said insurance company immediately thereafter paid to the said parties above named, respectively, the sum of $2,500.00 each, which said sum was not more than one-half the real value of the two said stores, or either of them. That said Southern Stock Mutual Insurance (228) Company is advised and believes, that in equity and good conscience it ought to be and is subrogated to the rights of the said Helen G. Brown and Charlotte J. Gorrell, respectively, and entitled to prosecute and recover from the said Water Supply Company all such sums as may be awarded against them by a jury in the cause now coming in the Superior Court of Guilford County, for the injury and damage done them by reason of their negligence and tortious failure to furnish a sufficient water supply to extinguish the fire which destroyed the said property as they were required under their contract to do, as well as by their common law obligation and duty owed to the public, independent of the contract, by reason of their exclusive use of the streets and enjoyment of the eminant domain of said city for such purpose.

That the Southern Stock Mutual Insurance Company is further advised and believes that their claim against the Water Supply Company is valid and binding, for the additional reason that, under the terms of the two several fire insurance policies hereinbefore referred to, it is expressly agreed that the said insurance company should be subrogated to and entitled to maintain all such actions against parties injuring or damaging, or permitting to be injured or damaged, the property thus injured, and that immediatlely after the said fire referred to, and after the payment by the said insurance company to the said Helen G. Brown, the sum of $2,500.00, she then and there by a paper writing, executed in due form, did assign, transfer and set over to the said insurance company her right of action against the said water company for the sum of $2,500.00 by them paid.

That the said insurance company contend and expect to prove upon the trial of said action that their said claim

of $5,000.00 against the said water company is a first lien in tort under and by virtue of Sec. 1255 of the N. C. Code, against all of the property, franchises, earnings and possession of the Greensboro Water Supply Company. The Superior Court of Guilford County having twice heretofore, in an action instituted and heard for that purpose, adjudg-
(229) ed that the defendant company did commit damage and injury to the owners of the said property hereinbefore referred to, by negligently and tortiously failing to perform their contract or discharge their obligations and duties otherwise owed and contracted to the inhabitants of the City of Greensboro, by reason of which the said property was destroyed, the owners damaged and this claimant unjustly required to pay $5,000.00. The said insurance company hereby reserves all of its rights and powers heretofore existing and now accruing to prosecute the said suit to final judgment in the Superior Court of Guilford County, and requests the auditor and special master to withhold his final report upon said claim until the sum total be fixed by verdict of a jury, unless the auditor and special master shall find the claimant entitled to the full amount demanded, in which event no objection is raised to the final report.

This 9th day of March, 1901.

SOUTHERN STOCK-MUTUAL INSURANCE CO.,
By L. M. SCOTT,
SCALES & SCALES &
A. L. BROOKS,
Attys. for Claimant.

Endorsed:

Filed in this office August 5, 1901.

SAM'L L. TROGDON, Clerk.

CREDITOR'S EXHIBIT No. "5."

To Clement Manly, Esq., Special Master & Auditor.

(230) Pursuant to a notice issued by you as special master and auditor in a cause entitled Guardian Trust and Deposit Company, complainant, against The Greensboro Water Supply Company, defendant, pending in the United States Circuit Court for the Western District of North Carolina, at Greensboro, notifying all parties interested in the funds of said defendant company's property or holding claims or demands against them to appear at the office of the clerk of the United States Court, at Greens-

boro, the 8th day of April, 1901, at 12 o'clock, and present same, we, therefore, respectfully submit the following: Attached hereto is a copy of a judgment rendered by the Superior Court of Guilford County, N. C., at a special term thereof held by Timberlake, Judge, in the month of January, 1901, in a cause therein pending entitled B. J. Fisher *vs.* Greensboro Water Supply Company, which was instituted prior to the appointment of the receiver herein wherein the plaintiff recovered of the defendant the said judgment for twenty-five thousand dollars damage for the tortious and negligent injury done the plaintiff's property. The attached judgment, as we are advised and believe, is, by virtue of Section 1255 of the Code of North Carolina, a first lien upon all the property of the defendant water company, and, as such, is therefore entitled in the distribution of the assets to be first paid before the bonds, mortgages or other liabilities of the said company are satisfied, and also a first lien upon the water plant and its earnings. In making proof of the said claim, we do hereby expressly reserve all rights, title and interest which we now have or may acquire under and by virtue of the laws of the State of North Carolina. This 9th day of March, 1901.

B. J. FISHER,
By A. L. BROOKS,
& JNO. N. STAPLES,
Attys. for B. J. Fisher.

NORTH CAROLINA, } In the Superior Court.
(231) Guilford County. } Special Term, January, 1901.

B. J. Fisher
vs.
Greensboro Water Supply Co. } Judgment.

This cause coming on to be heard and being heard before his Honor Judge E. W. Timberlake, and a jury, at the January Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract set out and described in the complaint in the quantity and for the purposes set out? Answer. "Yes."

2. At such time was the defendant company engaged

in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. "Yes."

3. Did the defendant company fail to comply with its contract? Answer. "Yes."

4. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

5. What damages, if any, has the plaintiff sustained? Answer. "$25,000.00."

It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff, B. J. Fisher, recover of the defendant, Greensboro Water Supply Company, the sum of twenty-five thousand dollars ($25,000.00) damages, and for the cost of this action to be taxed (232) by the clerk.

(Signed) E. W. TIMBERLAKE,
Judge Presiding.

I, John J. Nelson, Clerk of the Superior Court of Guilford County, do hereby certify that the foregoing is a true and exact copy of the judgment in the above entitled cause as it appears upon the records in this office.

Witness my hand and official seal this the 22nd day of February, 1901.

[Seal] JNO. J. NELSON, C. S. C.

NORTH CAROLINA, Guilford County. } Superior Court. June Term, 1901.

B. J. Fisher
vs.
Greensboro Water Supply Co.

This cause again coming on to be heard, and it appearing from the opinion of the Supreme Court rendered in said cause and now on file in the clerk's office of this county that the plaintiff's action for damages against the defendant company was founded upon a tort committed by such corporation, whereby the plaintiff was damaged in the destruction of his property, and that the findings of the jury upon the evidence adduced entitled the plaintiff to judgment accordingly.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiff, B. J. Fisher, recover of the defen-

dant, Greensboro Water Supply Company, the sum of twenty-five thousand thousand dollars ($25,000.00) for the tortious injury and damage done him by the negligence of the defendant corporation, and for the cost of this action.

W. B. COUNCIL,
Judge Presiding

NORTH CAROLINA, } In the Superior Court,
(233) Guilford County. { Clerk's Office.

I, John J. Nelson, Clerk of the Superior Court of Guilford County, do hereby certify that the foregoing is a true copy of the judgment rendered by the court in the case of B. J. Fisher *vs.* Greensboro Water Supply Company, at the June term, 1901, of the Superior Court of Guilford County, and now docketed in my office in judgment docket book, page —. This June 21st, 1901.

[Seal] JNO. J. NELSON, C. S. C.

Endorsed:

Filed in this office Aug. 5, 1901.

SAM'L L. TROGDON, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(234) WESTERN DISTRICT OF NORTH CAROLINA.
IN EQUITY. No. 151.

The Guardian Trust and Deposit Company of Maryland, Complainant,
vs.
The Greensboro Water Supply Company and Guarantee Trust & Safe Deposit Company of Philadelphia, Pa., Defendants.

Ceasar Cone would respectfully except to the report of the master, Clement Manly, Esq., made in the above entitled cause for that his findings of fact relative to the laying of the pipe on Summit avenue are inaccurate. He should have found:

That I purchased and paid for all of said pipe and had the same laid at my own expense, amount to $2,016.73, no part of which has ever been repaid to me; that all of this pipe thus purchased and laid was to remain and is my property, so agreed by the defendant water supply company and myself; that the water supply company was to ultimately purchase the said pipe and repay me my first outlay, to-wit: $2,016.73, without interest; this being paid, the pipe was then to become and be the property of the

said water supply company; that, in lieu of interest on the cost, the income from consumers along the line was to be divided equally between the water supply company and myself—the company to have half for supplying the water and I half for supplying the pipe; that the amount found by the master to be due me is on account of water used by consumers and has no reference to the first cost of the pipe.

Respectfully submitted,

CÆASAR CONE.

Endorsed:

Filed in this office Aug. 29, 1901.

SAM'L L. TROGDON, Clerk.

REPORT OF RECEIVER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(235) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust & Deposit Company, of Baltimore, Md.
vs.
Greensboro Water Supply Company.

To the Honorable the Judges of the above named Court:

In obedience to an order of this Honorable Court heretofore made in the above entitled cause, the undersigned would respectfully report:

1st. That on October 3rd, 1901, he executed and delivered to the City of Greensboro a deed for what is known as the Greensboro Water Works, and at the same time Cæsar Cone executed and delivered a deed to what is known as the Summit Avenue Branch. The transaction, for convenience of settlement in apportioning water rents, was as of September 1st, 1901.

2nd. That coincident with the delivery of the above deeds the said city paid over to the undersigned $75,266.66, the $266.66 being to cover interest on the $75,000 for thirty-two days at the rate of 4%, four per cent, per annum, such being the amount that was agreed to be paid to the city by the depositees, and the undersigned thereupon paid over to Cæsar Cone, in accordance with the orders of this court, $2,016.73. The above sum was paid to the undersigned by three checks: one for $25,000 on the City National Bank, which was left with said bank to the credit of the undersigned till the further orders of this court, at

the rate of four per cent per annum; another check was given on the Greensboro National Bank of this city for $25,000 and was left with the said bank to the credit of the undersigned till the further orders of this court, at the rate of four per cent. per annum, and the balance of $25,266.66 was paid by check on the Greensboro Loan &
(236) Trust Company, which was left with said company to the credit of the undersigned to bear interest at the rate of four per cent. per annum till the further orders of this court. The undersigned would further report that he has *no* on deposit with the Greensboro National Bank over $6,000 received for rents etc., during the operation of the property under the receivership; this, in addition to $1,500 interest heretofore paid on the first mortgage bonds in accordance with the order of this court, and the ordinary operating expenses.

The undersigned would respectfully pray this Honorable Court to pass an order making him an allowance in part for his services as receiver, and further that this Honorable Court designate a depository or depositories for the money above referred to.

Respecfully submitted,

R. R. KING, Receiver.

This October 5, 1901.

Endorsed:

Filed in this office Octo. 5, 1901.

SAM'L L. TROGDON, Clerk.

REPORT OF RECEIVER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(237) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company, of Maryland, Complainant, *vs.* The Greensboro Water Supply Company, Defendant.	In Equity. No.

The undersigned begs leave to report that he has just received a letter from the Greensboro Loan and Trust Company, a copy of which is as follows:

"Greensboro, N. C., October 16. 1901.

"Mr. R. R. King,

"Receiver Greensboro Water Supply Co., City.

"Dear Sir,—Referring to the money you have on de-

posit with us, we beg to advise that we would like to pay off ten thousand dollars $10,000, of the amount between the 1st and 15th of November, unless you are willing for it to remain after that time without interest.

"Very truly yours,

"Greeensboro Loan & Trust Co.,
"By J. W. Fry, President."

Wherefore, he prays that the court designate a depository or depositories for the money now in his hands derived from the operation and sale of the Greensboro Water Works in these proceedings fully described.

Respectfully submitted,

R. R. KING, Receiver.

Endorsed:

Filed in this office Octo. 17, 1901.

SAM'L L. TROGDON, Clerk.

ORDER OF COURT DESIGNATING DEPOSITORY.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(238) WESTERN DISTRICT OF NORTH CAROLINA.

IN EQUITY.

Guardian Trust and Deposit Company, of Maryland, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.
} No. ——

Upon considering the report of the receiver, R. R. King, and his request that the court shall designate a depository or depositories for the money in his hands as such receiver derived from the operation and sale of the property in these proceedings mentioned,

It is ordered and adjudged that the sum of $25,000.00 deposited with the City National Bank of Greensboro, N. C., together with the accumulated interest thereon, remain with said bank on the terms that it pay three per cent. (3%) interest per annum on such deposit.

Second. That as the Greensboro Loan and Trust Company has signified its desire to pay $10,000.00 of the money now and heretofore deposited with it, that the receiver be and he is hereby directed to collect the same in accordance with the said request of the said trust company, the said

trust company being permitted to retain the said $10,000.00 until the 15th of next month, and as to the other $15,-266.66, together with the accrued interest thereon, now with said trust company, the said receiver shall allow to remain there on the condition that the said trust company pay interest thereon at the rate of three per cent. (3%) per annum.

Third. That the said receiver, when he shall have collected the $10,000.00 from the Greensboro Loan and Trust Company, will deposit the same with the Greensboro National Bank, which is hereby designated as the depository (239) therefor, together with the $25,000.00, now deposited with said Greensboro National Bank, and whatever sum he has on hand derived from the operation of said water works on the condition that the said Greensboro National Bank, will pay interest thereon at the rate of three per cent. per annum.

That the two above named banks together with the said trust company are hereby made the depositories for the money now in the hands of the receiver according to the respective sums heretofore mentioned, till the further orders of this court.

An allowance of one thousand dollars is hereby made to R. R. King, receiver, on account of allowance to be made for his services as such receiver. This sum the said receiver is authorized to draw from and on account of his general account with the Greensboro National Bank, as receiver. And this cause is retained for further orders and directions.

JAS. E. BOYD,
U. S. Judge.

Octo. term, 1901.

Endorsed:

Filed in this office Octo. July 17, 1901.

SAM'L L. TROGDON, Clerk.

AGREEMENT OF COUNSEL.

(240) It is hereby agreed by counsel for appellants and counsel for appellees that the following papers from the case of Mittendorf *vs.* Greensboro Water Company be made a part of the transcript on appeal to the Circuit Court of Appeals in the case of Guardian Trust and Deposit Company *vs.* Greensboro Water Supply Company, to-wit:

Bill of complaint.
Answer.

Order appointing receiver.
Petition of Baltimore Trust and Guarantee Co.
Order in regard to payment of rental by city.
Letter of J. D. Glenn, receiver.
Ordinance of the City of Greensboro.
Answer of 2nd mortgage bondholders.
Answer of Seddon and Gittings Co.
Order to receiver.
Answer of Seddon, Gittings & Co. to petition of receiver.
Order authorizing issuing receiver's certificates.
Order directing sale of property and appointing commissioners.
Exceptions *to* first mortgage bondholders to report of master.
Answer of Sedden and Gittings & Co. to petition of receiver.
Letter of A. H. Taylor, Esq., to R. R. King, Esq.
Decree ordering second sale of property &c.
Report of Commissioners.
Order confirming sale by commissioners.
Commissioners advertisement of sale.
Final report of commissioners.
Final decree discharging commissioners and receivers.

JOHN N. WILSON,
Attorney for Helen G. Brown.
A. L. BROOKS,
Atty. for Scales assignee.
BYNUM & BYNUM,
Attorneys for Defendant.

Endorsed:

Filed in this office June 14th, 1902.

SAM'L L. TROGDON, Clerk.

Bill of Complaint.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(241) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et al.
vs.
The Greensboro Water Company, of Greensboro, N. C., Robert R. King and Archibald H. Taylor, trustees.

To the Honorable Hugh Lennox Bond, Judge of said Court.

The bill of complaint of J. Wiilliam Middendorf and

William B. Oliver, co-partners trading under the firm name of Middendorf, Oliver & Co., and William C. Seddon, and of John S. Gittings and William H. Bosley, co-partners trading under the firm name of John S. Gittings & Co., respectfully shows unto your Honor:

1st. That your orators, said plaintiffs, are citizens of Baltimore, Maryland, and the defendants, the Greensboro Water Company and Robert R. King, are citizens of the City of Greensboro, N. C., within the said Western District of North Carolina, and the said Archibald H. Taylor is a citizen of Maryland, and the cause or matter in dispute exceeds the value of $2,000, and is within the jurisdiction of this Honorable Court.

2nd. That your orators are creditors of the Greensboro Water Company, the defendants above named, being holders and purchasers for value of the second mortgage bonds of said company, dated May 1st, 1891, and payable twenty years after date, with coupons bearing interest at the rate of 6% per annum, and payable the first of May and the first of November in each year, the payment of which bonds and coupons is secured by a deed of trust of even date with said bonds, made by said Greensboro Water Company to Robert R. King and Archibald H. Taylor, and duly recorded among the Deed Records of Guilford County, North Carolina, a duly certified copy of which deed of (242) trust, marked Exhibit A, is herewith filed and prayed to be taken as a part of this bill; and that said bonds are subject to the lien of certain first mortgage bonds, amounting in the aggregate to fifty thousand dollars, and secured by a deed of trust, dated January 10th, 1888, from said Greensboro Water Company to the Guarantee Trust and Safe Deposit Company of Philadelphia, Pa., and that said second mortgage bonds amount in the aggregate, authorized to be issued, to twenty thousand dollars, of which your orators own bonds to the amount of seventeen thousand, five hundred dollars, in the following proportions, and to the amounts named, as follows, viz.: your orators Middendorf, Oliver & Co. are the owners of nine thousand dollars of said bonds, eighteen in number, each of the denomination of five hundred dollars, and your orator, William C. Seddon is the owner of four thousand dollars of said bonds, eight in number, each of the denomination of five hundred dollars and your orator John S. Gittings & Co. are the owners of four thousand, five hundred dollars of said bonds, nine in number, each of the denomination of five hundred dollars.

3rd. And your orators further aver that none of the

coupons upon said bonds falling due the first day of May, 1892, had been paid by said Greensboro Water Company, but that the coupons of said date upon the bonds heretofore purchased by and belonging to your orators aforesaid, are over due and unpaid, and your orators are informed and aver that there is no money in the treasury of the said Greensboro Water Company with which to pay said overdue coupons, nor is there any money which will be collectible or obtainable by said Greensboro Water Company within any reasonable date, out of which the payment of said coupons belonging to your orators may be later paid and satisfied, but, on the contrary, there are other and considerable debts due by the said Greensboro Water Company to the amount, to-wit: of one thousand dollars, especially the taxes upon the property of said company, amounting to $630, for which the property of said com-
(243) pany is liable to and has been threatened with immediate execution and sale, which liabilities said company is unable to pay, and that the company is threatened with other suits and bills and treas labor and material bills unpaid, and for the discharge of which it has no assets whatever, but that the said company is insolvent and will be unable to go on and perform the uses and duties for which it was incorporated, namely, to furnish water to the people and corporation of said City of Greensboro.

3rd. And your orators further aver that there is a certain rental, amounting to $2,875 per annum, which is payable by the corporation of the City of Greensboro to the said defendant company, by way of compensation, for the fire plugs and water for all purposes furnished by the said Greensboro Water Company to the corporation of the City of Greensboro, which rental was pledged by a resolution of the stockholders of the Greensboro Water Company, passed at their meeting, and by assignment of said Greensboro Water Company in accordance with said resolution, in trust to the Baltimore Trust and Guarantee Company, as trustee, as a special fund to be held in trust and applied to the payment of the semi-annual interest upon the coupons of the said first mortgage bonds of the Greensboro Water Company, falling due February 1st and Aug. 1st in each year, which assignment was recognized and accepted by said City of Greensboro, and all payments of such rental have been made hitherto in accordance therewith, and that the said corporation of the said City of Greensboro has given notice to the said Baltimore Trust and Guarantee Company that it will not pay the instalment of said rental falling due July 1st, 1892, and that, therefore, until

the payment of said rental can be enforced by suit or otherwise for the benefit of the first mortgage bondholders, that there would not only be no money in the treasury of said defendant company to pay the interest of the said second mortgage bonds held by your orators as aforesaid, but the interest upon the said first mortgage bonds will also be in (244) default, and said first mortgage bondholders will be entitled to have their mortgage foreclosed and to have a sale under the terms thereof.

4th. Your orators therefore aver that it is not only their right to have the second mortgage foreclosed and a sale ordered by this court under the terms thereof, but that it is their right to have said property immediately taken into the possession of this court by the appointment of a receiver who shall care for the same and operate it under the direction of this court until a sale can be ordered in accordance with the rights of the parties, and the terms of said mortgage, especially inasmuch as the said second mortgage aforesaid provided that immediately upon default on the payment of any of the coupons upon said second mortgage bonds, the said trustee should, upon request of the holders of one-fifth of said second mortgage bonds, take the property into their possession and hold and operate the same for the benefit of said mortgage bondholders, and further that said trustees should, at any time when it seemed to them proper and desirable for the protection of the interests committed to their custody and the more perfect effectuation of the trusts and purposes declared in said deed, invoke the aid of any court of equity of the United States to take jurisdiction of said property, and of the trusts declared concerning the same by said deed.

5th. And your orators further aver and charge that they have applied to said trustees, Robert R. King and Archibald H. Taylor, to carry out the provisions of the deed of trust or mortgage aforementioned for the protection of your orators, and that said trustees have replied that, while your orators were undoubtedly entitled to have the aforementioned proceedings taken in their behalf by said trustees, the said trustees, King & Taylor, for reasons personal to themselves, deemed it more proper that the court should itself order and appoint its own officer to carry out and perform the remedies provided by the said deed of trust, and within the equitable powers of this court to which your orators are entitled as aforesaid.

(245) 6th. And your orators further aver that the only material and substantial interests in the property of said

defendant company other than the lien of said second mortgage bondholders, is the lien held upon the same by the said first mortgage bondholders hereinbefore referred to, which bonds are owned and held, ten thousand dollars thereof by your orator William C. Seddon, and fifteen thousand dollars thereof by your orators John S. Gittings and Company, and twenty-five thousand dollars thereof by persons for whom your orators John S. Gittings and Company are bankers or attorneys in fact, and entitled to represent and bind said owners in respect to said bonds, and, therefore, it is within the knowledge and power of your orators to aver in behalf of all said first mortgage bondholders, and they do aver, that they deem it for their interest and advantage, and assent to the appointment by this court of a receiver for the property of said defendant company as herein prayed, and to a decree for the sale of the said property, subject to the lien of the first mortgage under which said first mortgage bonds are secured.

7th. And, further, your orators aver that never, since its organization and operation, has said defendant company earned or paid any dividends on its capital stock, and that, at a meeting held a considerable time prior to this date, said stockholders refused to advance any money for the relief of said company, and that a large proportion of the capital stock of the said company is held by persons nonresident of the State of North Carolina, and that all the negotiations and efforts of your orators and other creditors of the company to induce a quorum of said stockholders to meet and devise plans to relieve said company of its embarrassments have failed, inasmuch as said stockholders do not seem to consider their interest as such stockholders worth their care and attention, and, in fact, the affairs of said company are utterly neglected by the stockholders thereof, and the officers of said company have confessed (246) that the company has totally exhausted its credit, and is utterly without credit to enable it to raise money to pay off its liabilities already accrued and hereafter immediately to accrue.

8th. To the end, therefore, that this court may immediately pass its order appointing a receiver of this court to take into his possession all the property, books, rights, claims, corporate privileges and franchises of said Greensboro Water Company, and hold, operate, control and manage the same under the direction of this court, until a sale as hereinafter prayed, or until discharged by order of this court.

And, further, may pass upon, establish, adjudicate and

determine all liens upon the property and franchises of said defendant company, and their relative order and amount, and all debts due by said company and claims against or interest of any sort whatever in said company or its property held by any person whatsoever, and may pass a decree for the sale of all the property, rights and franchises and interests of said company (subject only to the lien of the mortgage for the benefit of the first mortgage bonds of said company hereinbefore referred to) according to the terms of the second mortgage of the said defendant company to R. R. King and A. H. Taylor, hereinbefore mentioned, and the course and custom of this Honorable Court in such matters.

And may grant such other and further relief as may to their case seem fit, and your Honors see proper to grant.

Your orators pray your Honor to grant the writ of subpœna directed to the said Greensboro Water Company, to be served upon its president or director or certain attorney, to Robert R. King and Archibald H. Taylor, trustees, as hereinbefore mentioned, directing them to be and appear in this court on a day therein named, to answer the matters and facts herein alleged against them, and to do whatever may be necessary to protect their interests in the premises. (247) And will ever pray.

MIDDENDORF, OLIVER & CO.,
By J. W. MIDDENDORF,
JOHN S. GITTINGS & CO.,
WILLIAM C. SEDDON.

STATE OF MARYLAND, Baltimore City, } To-wit:

I hereby certify that before me, the undersigned, a justice of the peace of the State of Maryland, in and for Baltimore City aforesaid, personally appeared this sixteenth day of May, in the year 1892, J. William Middendorf, one of the above named plaintiffs, and made oath in due form of law, that the matters and facts set out in the foregoing bill of complaint are true as therein set out.

JNO. S. MADDOX, J. P.

Endorsed:

Filed in this office July 7, 1892.

SAM'L L. TROGDON, Clerk.

Answer of R. R. King, Attorney for Defendant Co.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(248) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et al.
The Greensboro Water Company et al.

To the Judge of said Court:

The answer of the Greensboro Water Company to the bill of complaint of J. William Middendorf and others filed in the above entitled proceeding, respectfully shows unto your Honor:

First. That this respondent admits the matters and facts alleged in the said bill of complaint.

Second. That this respondent assents to the passage immediately of an order of this court appointing a receiver of this court to take into his possession and custody, and operate the property and business of the Greensboro Water Company, in as much as it seems for the best interest of all parties interested in the property, that the court should take the custody and administration of the property and affairs of this company into its own hands.

Third. And this respondent further submits itself to the judgment of this court as to what should be done for the proper protection of the interest of all parties in the premises.

As witness the signature of R. R. King, the treasurer and general attorney of said respondent, and the corporate seal of the Greensboro Water Company, this respondent.

[Seal] R. R. KING,
Treasurer and Att'y for Defendant Co.

Endorsed:

Filed in this office July 7, 1892.

SAM'L L. TROGDON, Clerk.

ORDER APPOINTING RECEIVER.

(249) IN THE CIRCUIT COURT OF THE UNITED STATES.

J. W. Middendorf et al.
vs.
The Greensboro Water Company.

Upon consideration of the bill of complaint of J. W. Middendorf et al. in the above entitled proceedings, and of

the answers of the defendant, The Greensboro Water Company, and Robert E. King and Archibald H. Taylor, trustees, likewise filed in said proceedings, it is this fourth day of June, by the Circuit Court of the United States for the Western District of North Carolina, ordered and decreed that, in accordance with the prayer of said bill, that James D. Glenn, of Greensboro, be, and he is hereby, appointed the temporary receiver of the said Greensboro Water Company to take into his possession all the property, books, rights, claims, corporate privileges and franchises of said Greensboro Water Company, and to hold, operate control and manage the same under the direction of this court, and that he shall make a report to the court, as soon as may be convenient, of what property of said body corporate, so as aforesaid to be taken into his possession and management, consists, and of the condition thereof, and he shall, from time to time, viz.: quarterly, return a report and account to this court of the operation of the property and business of said body corporate in his hands, and shall make a particular report to this court of anything that may be deemed of special interest and importance in connection with said receivership.

And, further, said James D. Glenn is authorized and empowered to borrow a sum not exceeding five hundred dollars for the purpose of immediately putting in place and repairing the pumps and other necessary machinery of said company, and to issue receiver's certificates for said indebtedness thus authorized to be secured, which shall be a first lien upon all the property, earnings and franchises of said defendant body corporate.

And, before acting as said receiver, said James D. (250) Glenn shall qualify by giving bond in the penalty of five thousand dollars, conditioned for the faithful performance of the duties of said receivership, and for his obediance to all orders of this court in the premises, and the securities upon said bond shall be approved by the clerk or judge of this court.

And it is further ordered that this *court* is set for a hearing on the second Tuesday of June, 1892, at Charlotte, North Carolina, in order that all parties interested in the premises may show cause, if any there be, why said temporary receivership should not be made permanent.

HUGH L. BOND, Ct. Judge.

Endorsed:

Filed in this office June 8th, 1892.

SAM'L L. TROGDON, Clerk.

Petition of Baltimore Trust & Guarantee Company.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN
(251) DISTRICT OF NORTH CAROLINA.

Middendorf, Oliver & Co. et al.
vs.
The Greensboro Water Co. et al. } In Equity.

To the Honorable Hugh L. Bond, Judge of said Court:

The petition of the Baltimore Trust & Guarantee Company respectfully represents:

That the Greensboro Water Company assigned to your petitioner the annual rental, amounting to two thousand, eight hundred and seventy-five dollars, which the City of Greensboro agreed to pay to the said water company, as water rent, in trust for your petioner to collect and appropriate the same to the payment of the interest coupons upon the first mortgage bonds of said water company, as is alleged in the bill of complaint in this case, and as will appear by copy of a resolution of the said Greensboro Water Company hereto annexed, marked "Petitioner's Exhibit A."

That said water rent is due and payable, in semi-annual instalments, on the first days of January and July in each year. That the semi-annual instalment, due on the 1st of July last, has not been paid. But your petitioner is informed that the City of Greensboro, in view of the appointment of the receiver in this cause, is unwilling to make said payment until this court has determined who is the proper party to receive it.

Your petitioner also avers that the interest coupons, for the payment of which said water rent is assigned to your petitioner, are due on the first day of August next, and that it is necessary that said instalment of water rent should be promptly collected in order to meet said coupons.

Your petitioner therefor prays that your Honor will pass an order authorizing your petitioner to receive and re-
(252) ceipt for said water rent from the City of Greensboro now due and as the same becomes due, and appropriate the same to the purposes and trusts declared in said assignment, until the further order of this court.

Your petitioner will ever pray, etc.

BALTIMORE TRUST & GUARANTEE CO.,
By ROBERT C. DAVIDSON, President.
DILLARD & KING, Sols. for petitioner.
BLAKESTONE & BLAKESTONE,
Solicitors for Peti.

UNITED STATES OF AMERICA, District of Maryland, } *ss:*

Be *is* remembered and it is hereby certified that on this 23rd day of July, A. D., 1892, personally appeared before me, a Commissioner of the Circuit Court of the United States for the Fourth Circuit in and for the District of Maryland, Robert C. Davidson, who, in my presence, signed the foregoing petition, and, being first by me duly sworn, according to law, makes oath, deposes and says that the matters and facts set forth and stated in said petition as of his own knowledge are true, and that the matters and facts thereon stated upon information are true to the best of his knowledge and belief.

In witness whereof, I hereunto set my hand and affix my seal, at the City of Baltimore, within the District of Maryland, this 23rd day of July, A. D., 1892.

[Seal] R. LYON ROGERS,
U. S. Commissioner for Maryland.

Endorsed:

Filed in this office July 28, 1892.

SAM'L L. TROGDON, Clerk.

"Petitioners' Exhibit A."

(253) Copy of the resolutions passed at the meeting of the stockholders of the Greensboro Water Company, held in Greensboro, N. C., February 13, 1890.

Whereas, at the time of the sale of the bonds of this company, known as the first mortgage bonds of this company, bearing date January 10th, 1888, and the whole amount of which issue is fifty thousand dollars, it was represented to the purchasers thereof that the prompt payment of the interest upon said bonds, maturing on the first days of February and August in each year, was in any and all events secured by the annual rental of two thousand, eight hundred and seventy-five dollars or more, agreed to be paid to this company by the City of Greensboro, for the use of the seventy-five or more hydrants, which said city contracted to have constructed and supplied with water for its use, according to the terms of the ordinance adopted by said city and accepted *to* this company, and it was further represented to the holders and purchasers of said bonds that the fund arising from said annual payment or rental of said city should be and be regarded as pledged or charged with the payment of the interest on said bonds for the benefit of the holders of said bonds, prior to all other

debts, charges and uses of this company or the claims of any other of its creditors and in consideration of the fact that all the money received from the sale of said bonds paid by the purchasers thereof, has been paid into the treasury of this company, which has received the full benefit thereof, now, therefore, be it

Resolved by the Greensboro Water Company that, in consideration of the foregoing premises and preamble, that the annual rental of two thousand, eight hundred and seventy-five dollars falling due in equal semi-annual instalments on the first days of January and July in each year, (254) and all additional payments or rentals for additional hydrants, or water used, or to be used by the said body corporate, the City of Greensboro, are hereby finally and irrevocably transferred, assigned and set over to the Baltimore Trust and Guarantee Company of Baltimore and their successors in this trust, in trust to collect the aforesaid rental or payment from the said City of Greensboro and promptly apply and disburse the same to and for the payment of the interest or coupons upon the bonds aforesaid, issued by this company to the owners or holders thereof, and the balance, if any, over and above the three thousand dollars annual rental for this purpose, to account for to this company. And the said trustees and their successors are hereby authorized and empowered to receive and collect the money or rental or income aforesaid, hereinafter falling due and payable by the City of Greensboro to this company aforesaid, and to give release, discharge and acquitance therefor to the said City of Greensboro, or its officers, in behalf of this company, as fully and completely as this company itself, by its own proper officers could do, and said City of Greensboro shall be no further liable for the application of said rental or payment, after payment to said trustees or their successors; and a copy of this resolution, under the seal of this company, shall be deposited with said City of Greensboro, or the proper officers of said body corporate, as evidence of the warrant and right of the trustees herein named, or their successors, to collect, receipt for, and give release for said payment, when and as the same may fall due as aforesaid.

I hereby certify that the above is a true copy of the preamble and resolution unanimously passed by the stockholders of the Greensboro Water Company, at a meeting held at Greensboro, N. C., February 13th, 1890.

CHAS. N. VANCE,
Secretary Greensboro Water Co.

Order In Re Payment of Rental.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN
(255) DISTRICT OF NORTH CAROLINA.

Middendorf, Oliver & Co. et al. }
vs. } In Equity.
The Greensboro Water Co. et al. }

ORDER.

The petition of the Baltimore Trust & Guarantee Company having been read and considered, and it appearing to the court that the annual rental contracted to be paid by the City of Greensboro of $2,875.00, falling due in equal semi-annual instalments on the 1st days of January and July in each year, was fully and irrevocably transferred, assigned and set over to the Baltimore Trust and Guarantee Company, in trust to collect and apply the same to the payment of the interest coupons upon the first mortgage bonds of said company.

And it further appearing that the said City of Greensboro is ready and willing to pay said rental for January 1st past to July 1st inst., but is in doubt as to whom it should be paid, and it further appearing that the said Trust Company is entitled to receive said rental for the purposes and trust above set forth, it is, thereupon, this 24th day of July, 1892, ordered by the court that the said Baltimore Trust & Guarantee Company be, and it is hereby, authorized to receive from the City of Greensboro, upon the trusts above set forth, the said instalment of water rent due on the 1st of July, 1892, the future instalments of said rent as the same may become due, until the further order of this court, and as payment is made, shall hand the first mortgage interest coupons to the receiver in this court.

And it is further ordered that the receiver in this case be, and he is hereby, discharged from all responsibility on
(256) account of all said payments which may be made while this order shall remain in force.

HUGH L. BOND, Ct. Judge.

Endorsed:

Filed in this office July 28, 1892.

SAM'L L. TROGDON, Clerk.

Letter of Receiver to City.

DUPLICATE.

(257) Greensboro, N. C., April 27, 1893.

To the Board of Aldermen of the City of Greensboro, N. C.

I take pleasure in informing your honorable body that I have laid before Judge of the Circuit Court of the United States a copy of the ordinance passed by your board providing for additional extension of the company's plant and equipment within the corporate limits of the City of Greensboro, and for such other matters as are treated of in such ordinance, with my recommendation and approval that the court should take the action intended by said ordinance. After due consideration, the court passed a decree of date April 25th, 1893, approving the construction provided for by said ordinance, and authorizing me, as receiver, to accept the same on behalf of the Greensboro Water Company, and to take the necessary steps to make the construction desired by you.

I have assured the court and the creditors of the company that, by this mutual agreement on the part of the company and the city, all questions between the City of Greensboro and the water company are forever and finally adjusted, and I find great satisfaction in the belief that when the additional construction is completed by me, the city and the citizens of Greensboro will enjoy all facilities in the way of an ample supply of water that can be reasonably desired.

Yours very truly,

JAS. D. GLENN, Receiver.

Endorsed:

Filed in this office April 27, 1893.

SAM'L L. TROGDON, Clerk.

City Ordinance.

(258) Be it ordained by the Board of Aldermen of the City of Greensboro, N. C.

(1) That the powers and privileges heretofore granted and conceded by ordinance of the said City of Greensboro dated the day of , 1887, granting certain privileges, ranchises and rights to W. W. Taylor, Chas. S. Hinchman and Fred B. Hubbell, to erect and operate water works in Greensboro, which rights and privileges were af-

terwards assigned and vested in the Greensboro Water Company by the assent of the said City of Greensboro, be, and the same are hereby, reviewed, granted and confirmed unto the said Greensboro Water Company, to be exercised, owned and enjoyed by said company and its assigns, for a like period or periods of time from the present date as in said ordinance named, over and through all the territory added to and now embraced within the corporate limits of the said City of Greensboro as at present established or hereafter may be extended by Act of Incorporation. Provided, further, that this ordinance shall have no effect upon the mutual rights of the City of Greensboro and the Greensboro Water Company, unless the receivers of said company appointed in the suit now pending in the Circuit Court of the United States shall, on behalf of the creditors and stockholders of the company, accept the same, and obtain the authority of the court to commence the work hereby called for, which work shall begin within four months from the date of the passage of this order, and shall diligently and continuously prosecute the said work on behalf of said company until it is completed.

(2) That the said water company on its part in consideration of the privileges and rights hereby granted and confirmed, and the semi-annual payments to it or its assigns, to be made as hereinafter agreed, shall be, and is, bound and obliged to extend its water pipes as follows.

Extend pipe on south Elm street from Lee to McCulloch street, a distance of one thousand, three hundred and (259) ninety-five feet, using 8 inch pipe.

Take up the 4 inch pipe now in use on Arlington street, and replace and extend same from Fayetteville to a point four hundred and thirty-three feet south of north side of east Bragg, a distance of one thousand, three hundred and fifty-eight feet, using 6 inch pipe.

Extend the 8 inch pipe on Asheboro street from east Lee to McCulloch street, a distance of one thousand, seven hundred and thirty-five feet.

Put in along east Lee a 6 inch pipe from Asheboro street to a point a distance of nine hundred and thirty-four feet from present line of pipe at intersection of east Lee and Asheboro streets.

Take up the 4 inch pipe now on south Ashe street, and replace and extend the same from Buchanon street to west McColluch st. with 6 inch pipe, a distance of 1,748 feet south of last hydrant now in use on south Ashe street.

Lay a 6 inch pipe on west Bragg from south Ashe, west 866 feet.

Extend the 6 inch pipe on west Market street from present terminus to Mendenhall street, a distance of 1,254 feet.

Extend pipe on Greene street from northernmost hydrant to intersection with Keogh st., a distance of 932 feet, using 6 inch pipe. Take up the 4 inch pipe now in use from Forbis st. on east Market to Gilmer, and replace with 6 inch, and extend the same to a point 1,300 feet east of western side of Gilmer street.

(3) That through these several lines of pipes the said water company on its part hereby agrees and binds itself and assigns to, at all times, have, maintain, keep and supply to the City of Greensboro, N. C., an adequate supply of water for fire purposes to be supplied from the water tower as it now stands, just south of the depot, or another substantially the same, on or near the same location, with such preesure as can naturally be gotten therefrom, the water to be supplied to the city through double opening hydrants or fire plugs to be located as hereinafter specified. (260) That the said company hereby agrees and binds itself and assigns to put double opening hydrants or fire plugs on the several lines of pipe herein provided for at such points as said city shall designate, provided the said city shall pay for the same as hereinafter provided for.

(IV) The said city on its part hereby agrees and binds itself to take at least 12 hydrants or fire plugs for every linear mile in the sum total of the distance hereinbefore named, and to pay for each the sum of $17.50 on the first day of January and July in each year, from the time said company is ready to supply water to said city for fire purposes as above 'till the powers, privileges, etc., herein granted expire. And so likewise as to any extension in the future.

(V) That, if the city shall at any time buy the water works as provided in the said grant of power to Taylor and others, it shall buy and take the addition herein provided for, and such others as may hereafter be made, on the same terms and conditions as if the same had been a part of the original plant.

(VI) That as the necessity may arise for additional pipes and hydrants for fire purposes, as the city improves and is built up within its present corporate limit and in any territory that shall or may be brought within the corporate limits in the future, the said Greensboro Water Company agrees to lay down and extend its pipes and erect hydrants sufficient to supply such necessity and need on the part of

the city and its inhabitants upon the terms and for the compensation herein fixed, to be paid for the use of the hydrants and facilities of said company by the citizens and by the corporation, whenever the same shall be required by the city through its Board of Aldermen, by resolution adopted at any regular meeting of the board. But at no time shall the water company be required to put down a larger pipe than shall be necessary for efficient service.

(VII) The said Greensboro Water Company shall supply water to the inhabitants of said City of Greensboro for (261) domestic use and mechanical purposes at rates not exceeding the maximum rates at which supplies of water are now furnished. This limitation, however, not to apply in any way to railroad companies, factories, fountains and schools, who may enter into special contracts with said water company.

(VIII) That whenever for any purpose it shall become necessary for the water company to dig up any street or streets, or to remove stone or dirt therefrom, then they shall replace said street or streets is as good condition as they were when the work on the same was commenced, and replace said stone or dirt in such manner as shall prevent all damage to said street, or to the adjacent property.

That the said company shall flush the pipes in the same manner as provided for in the ordinance granting the franchise and privileges to W. W. Taylor, Chas. S. Hinchman and Fred B. Hubbell, referred to in first section of this ordinance. And said water company shall be responsible for all damages sustained by the city or any individual or individuals, for any injury sustained from the negligence of said company, either in the construction or operation of their plant.

(IX) That this ordinance is hereby adopted by this board, and upon its approval by the receiver of said Greensboro Water Company, and such approval duly certified to this board, the same is declared to be in full force and effect.

(X) That the clerk of this board is directed to furnish forthwith to the said Greensboro Water Company, a duly certified copy of this ordinance.

STATE OF NORTH CAROLINA, }
Guilford County. }

I, John N. Wilson, Clerk of the City of Greensboro, in said county and State, hereby certify that the foregoing is a true copy of an ordinance adopted by said City of

Greensboro granting a franchise to the Greensboro Water Company.

JOHN N. WILSON, City Clerk.

STATE OF NORTH CAROLINA, } City of Greensboro.
(262) Guilford County, }

I hereby certify that John N. Wilson whose genuine signature is signed to the foregoing certificate is and was City Clerk of the City of Greensboro aforesaid at the time of so signing his name, and that his certificate is in due form and entitled to full faith and credit.

In testimony whereof I have hereunto set my hand as Mayor, and affixed the seal of my office, at office in Greensboro, on this the 18th day of February, 1893.

[Seal] J. R. MENDENHALL,
Mayor of Greensboro, N. C.

Endorsed;

Filed in this office April 27, 1893.

SAM'L L. TROGDON, Clerk.

Answer of 2nd Mortgage Bondholders.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(263) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et als.
vs.
The Greensboro Water Company.

To the Honorable the Judges of said Court:

The answer of the second mortgage bondholders of the Greensboro Water Company, the complainants in these proceedings mentioned, by Archibald H. Taylor, their solicitor and attorney, unto the petition and report of James D. Glenn, the receiver in these proceedings mentioned, dated March 7th, 1893, respectfully shows unto your Honors:

1. These respondents admit the matters and facts in said petition set out and alleged and believe that it would be for the advantage of the second mortgage bondholders, as well as for all classes of creditors, and the stockholders of the Greensboro Water Company to make the extension of the mains and pipes and other improvements as mentioned in said receiver's petition.

2. These respondents, therefore, consent to the passage of an order of the court authorizing the said receivers to issue receiver's certificates, which shall be a first charge and lien upon all the estate and property of the said Greensboro water Company, in these proceedings mentioned, to

the amount of eight thousand, five hundred dollars, bearing such interest as the court may determine, and the proceeds of which shall be expended under the order of the court in making the improvements and extentions recommended by the receiver in his said petition.

3. And in all particulars, as to the matters alleged and prayed in said petition, these respondents submit them-
(264) selves to the order and direction of this Honorable Court in the premises.

ARCHIBALD H. TAYLOR,
Attorney and Solicitor for J. W. Middendorf
and others, complainants in these proceedings,
and being all the second mortgage bondholders.

Endorsed:

Filed in this office April 27, 1893.

SAM'L L. TROGDON, Clerk.

Answer of Seddon & Gittings & Company.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(265) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et als.
vs.
The Greensboro Water Company.

To the Honorable the Judges of said Court:

The answer of William C. Seddon and of John S. Gittings & Company, bankers and attorneys in fact for the first mortgage bondholders in these proceedings mentioned, unto the petition and report of James D. Glenn, the receiver in these proceedings mentioned, dated March 7, 1893, respectfully shows unto your Honors:

1. These respondents state that the first mortgage bonds of the said company are owned largely in their own right by your respondents and others, not owned by your respondents, are owned by persons, customers and clients of your respondents, who have committed their interests in this litigation to your respondents, as their agents or attorneys in fact, so that your respondents represent and control, practically, all of said issue of first mortgage bonds.

2. These respondents admit the matters and facts in said petition set out and alleged and believe that it would

be for the advantage of the first mortgage bondholders, as well as for all classes of creditors, and the stockholders of the Greensboro Water Company to make the extension of the mains and pipes and improvements as mentioned in said receiver's petition.

3. These respondents, therefore, consent to the passage of an order by the court authorizing the said receivers to issue receiver's certificates, which shall be a first charge and lien upon all the estate and property of the said Greensboro water Company, in these proceedings mentioned, to the amount of eight thousand five hundred dollars, bearing (266) such interest as the court may determine and the proceeds of which shall be expended under the order of the court, in making the improvements and extensions recommended by the receiver in his said petition:

4. And in all particulars, as to the matters alleged and prayed in said petition, these respondents submit themselves to the order and direction of this Honorable Court in the premises.

WILLIAM C. SEDDON,
JOHN S. GITTINGS & CO.

STATE OF MARYLAND, City of Baltimore, } To-wit:

I hereby certify that before me, the undersigned, Henry R. Dulaney, a notary public of the State of Maryland, in and for Baltimore City, personally appeared this 21st day of April, 1893, William H. Bosley, a member of the firm of John S. Gittings and Company, the above named respondents, and made oath, in due form of law, that the matters and facts stated in the foregoing answer are true as therein stated.

Witness my hand and and notarial seal.

[Seal] HENRY R. DULANEY,
Notary Public.

Endorsed:

Filed in this office April 27, 1893.

SAM'L L. TROGDON, Clerk.

Order to Receiver.

(267) Upon consideration of the petition of James D. Glenn, the receiver in these proceedings mentioned, and the exhibit therewith filed and of the answers of William C.

Seddon, John S. Gittings and Company, bankers and attorneys in fact, in behalf of the first mortgage bondholders of the Greensboro Water Company, and of the second mortgage bondholders of the said company, the complainants in these proceedings mentioned, and of the Greensboro Water Company, the defendant, it is this 25th day of April, 1893, adjudged and decreed by the Circuit Court of the United States for the Western District of North Carolina, that the said J. D. Glenn, the receiver aforesaid, issue receivers' certificates of indebtedness to the amount and in the principal sum of eight thousand, five hundred dollars, bearing interest not exceeding seven per cent. per annum, and payable semi-annually, which certificates shall be a first lien on all the property and franchises of the Greensboro Water Company in these proceedings mentioned, prior to the lien of the mortgages or deeds of trust securing the issue of first mortgage bonds and of second mortgage bonds in these proceedings mentioned and referred to, until the same are paid and discharged, and which certificates shall be in the manner and form following and to the following effect, that is to say:

The Greensboro Water Company.

Receiver's Certificate of Indebtedness.

This is to certify that the undersigned, not personally, but as receiver of the property and franchises of the Greensboro Water Company, is indebted to the holders hereof in the sum of $500 and interest thereupon from date until paid at the rate of not exceeding seven per cent. per annum, payable on the first days of May and November in each year.

This certificate is one of the series of $500.00 each, numbered from 1 to 17, inclusive, issued by virtue of an order of the Circuit Court of the United States for the (268) Western District of North Carolina, in a suit in equity, pending in said court, wherein J. W. Middendorf and others are complainants, and the said Greensboro Water Company is defendant, which order is dated the 25th day of April, 1893, and said certificate is thereby declared to be a debt for the amount named therein, due from date by the undersigned and his successors as receivers only, and incurred for the benefit and protection and improvement of the property of the said Greensboro Water Company, and is also by the terms of said order, declared to be a first lien upon all the property, franchises and revenues of the Greensboro Water Company, in possession of the receiver and under the control of said court, and hereafter to be constructed and acquired by said receiver; and particularly

to be a lien prior to the lien of the mortgages or deeds of trust mentioned in these proceedings and known as the first mortgage and second mortgage upon said company's property and of the bondholders under said mortgages.

In witness whereof, I, as such receiver, have signed this certificate, this first day of May, 1893.

And it is further ordered that the money received by said receiver from the sale or negotiation of the certificates hereby ordered to be issued, or any portion thereof, shall be expended by said receiver or his successors, in the purchase and construction of the improvements, equipments and additions to the property of the said company recommended in said receiver's petition and in the contract between the City of Greensboro and the said Greensboro Water Company, contained in the ordinance, passed by the Board of Alderman of the City of Greensboro, which is filed with the above mentioned petition of the said receiver.

HUGH L. BOND,
Ct. Judge.

Endorsed:

Filed in this office April 27, 1893.

SAM'L L. TROGDON, Clerk.

Answer of Seddon & Gittings & Company.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(269) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et als.
vs.
The Greensboro Water Company.

To the Honorable the Judges of said Court:

The answer of William C. Seddon and of John S. Gittings & Company, bankers and attorneys in fact for the first mortgage bondholders in these proceedings mentioned, unto the petition and report of James D. Glenn, the receiver in these proceedings mentioned, dated June 29th, 1895, respectfully shows unto your Honors:

1. These respondents state that the first mortgage bonds of the said company are owned largely in their own right by your respondents and others, not owned by your respondents, are owned by persons, customers and clients of your respondents, who have committed their interests in this litigation to your respondents, as their agents or attorneys in fact, so that your respondents represent and

control, practically, all of said issue of first mortgage bonds.

2. These respondents admit the matters and facts in said petition set out and alleged and believe that it would be for the advantage of the first mortgage bondholders, as well as for all classes of creditors, and the stockholders of the Greensboro Water Company to make the extension of the mains and pipes and improvements as mentioned in said receiver's petition.

3. These respondents, therefore, consent to the passage of an order by the court authorizing the said receivers to issue receiver's certificates, which shall be a first charge and lien upon all the estate and property of the said Greensboro water Company, in these proceedings mentioned, to the amount of twenty-five hundred dollars, bearing (270) such interest as the court may determine and the proceeds of which shall be expended under the order of the court, in making the improvements and extensions recommended by the receiver in his said petition:

4. And in all particulars, as to the matters alleged and prayed in said petition, these respondents submit themselves to the order and direction of this Honorable Court in the premises.

WILLIAM C. SEDDON,
JOHN S. GITTINGS & CO.

Endorsed:

Filed in this office March 30, 1894.

SAM'L L. TROGDON, Clerk.

Order Authorizing Issuing Receiver's Certificates.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NO.
(271) CA. IN THE CIRCUIT COURT, AT GREENSBORO.
MARCH 30TH, 1894.

J. W. Middendorf and others
against
The Greensboro Water Company,
Jas. D. Glenn, Receiver.
} Order of Court.

Upon consideration of the petition of James D. Glenn, the receiver in these proceedings mentioned, and the exhibit therewith filed and of the answers of William C. Seddon, John S. Gittings and Company, bankers and attorneys in fact, in behalf of the first mortgage bondhold-

ers of the Greensboro Water Company, and of the second bondholders of the said company, the complainants in these proceedings mentioned, and of the Greensboro Water Company, the defendant, it is this 30th day of March, 1894, adjudged and decreed by the Circuit Court of the United States for the Western District of North Carolina, that the said James D. Glenn, the receiver aforesaid, issue receivers' certificates of indebtedness to the amount and in the principal sum of three thousand, dollars, in addition to those heretofore issued, bearing interest not exceeding seven per cent. per annum, and payable semi-annually, which certificates, with those heretofore issued, shall be a first lien on all the property and franchises of the Greensboro Water Company in these proceedings mentioned, prior to the lien of the mortgages or deeds of trust securing the issue of first mortgage bonds and of second mortgage bonds in these proceedings mentioned and referred to, until the same are paid and discharged, and which certificates shall be in the manner and form following and to the following effect, that is to say:

The Greensboro Water Company.

Receiver's Certificate of Indebtedness.

This is to certify that the undersigned, not personally, but as receiver of the property and franchises of the Greens-
(272) boro Water Company, is indebted to the holders hereof in the sum of $500 and interest thereupon from date until paid at the rate of not exceeding seven per centum per annum, payable on the first days of April and October in each year.

This certificate is one of the series of $500.00 each, numbered from 18 to 23, inclusive, issued by virtue of an order of the Circuit Court of the United States for the Western District of North Carolina, in a suit in equity, pending in said court, and the said Greensboro Water Company is defendant, which order is dated the 30th day of March, 1894, and said certificate is thereby declared to be a debt for the amount named therein, due from date by the undersigned and his successors as receivers only, and incurred for the benefit and protection and improvement of the property of the said Greensboro Water Company, and is also, by the terms of said order, declared to be, with the certificates heretofore issued, a first lien upon all the property, franchises and revenues of the Greensboro Water Company, in possession of the receiver and under the control of said court, and hereafter to be constructed and acquired by said receiver; and particularly to be a lien prior to the lien of the mortgages or deeds of

trust mentioned in these proceedings and known as the first mortgage and second mortgage upon said company's property and of the bondholders under said mortgages.

In witness whereof, I, as such receiver, have signed this certificate, this second day of April, 1894.

And it is further ordered that the money received by said receiver from the sale or negotiation of the certificates hereby ordered to be issued, or any portion thereof, shall be expended by said receiver or his successors in the purchase and construction of the improvements, equipments and additions to the property of the said company recommended in said receiver's petition and in the contract be-
(273) tween the City of Greensboro and the said Greensboro Water Company, contained in the ordinance, passed by the Board of Aldermen of the City of Greensboro, which is filed with the above mentioned petition of the said receiver.

This decree is made upon the full consent of the first and second mortgage bondholders and by the defendant water company made by their attorney, R. R. King, now present.

Let this decree and all the proceedings for obtaining same be entered of record in this case pending in the Circuit Court of Equity, at Greensboro.

ROBT. P. DICK,
U. S. Judge.

Endorsed:

Filed in this office March 30, 1894.

SAM'L L. TROGDON, Clerk.

Order Directing Sale of Property.

(274) This cause coming to a hearing upon the bill of complaint, the answer of the trustees, R. R. King and Archibald H. Taylor, and the answer of the defendant, the Greensboro Water Company, and the reports of the receiver, James D. Glenn, filed in this cause to date, and all other proceedings in said cause being duly read and considered, upon consent of the complainants by their counsel, Archibald H. Taylor, and of the defendant, the Greensboro Water Company, by its counsel, Robert R. King, the court doth order, adjudge and decree as follows, viz.: It appearing to the court that the plaintiffs, the second mortgage bondholders, are entitled to have a decree of foreclosure of said mortgage for defaults in the terms thereof, and a sale

thereunder, subject only to the lien of the first mortgage in these proceedings mentioned, the said Robert R. King and Archibald H. Taylor are hereby appointed commissioners to sell the mortgaged property in these proceedings mentioned, being all the property, rights and franchises of the Greensboro Water Company, and all the property and rights in the hands of the receiver, James D. Glenn, heretofore appointed by the court in this cause, and such sale shall be subject to the lien of the first mortgage bonds under the first mortgage as being the same in these proceedings mentioned, but the rights of the defendant body corporate, and of all other persons or bodies corporate claiming under the said defendant company, shall be and are forever barred and discharged, and the course and manner of said sale shall be as follows: said commissioners shall first give not less than three months notice of the time, place and terms of sale by advertisement at least twice a month in some newspaper published in Guilford County, North Carolina, and in some newspaper published in the City of Baltimore, Maryland, and such other advertisement as may to said commissioners seem proper, and said sale shall be at public auction to the highest bidder in the City of Greensboro, North Carolina, and the terms of sale shall be as follows: (275) the purchaser being the highest bidder shall pay to the said commissioners at the time of the sale cash on account of the purchase money for the property to the amount of five hundred dollars, and immediately upon the ratification of the sale, which may be reported to this court for ratification in vacation or during term immediately after the sale, said purchaser shall pay or deliver to said trustees on account of said purchase money cash or receiver's certificates now issued and outstanding under the orders of this court in this cause to the full amount of said receiver's certificates, and the balance of said purchase money shall be payable and dischargeable in money or in evidences of debt due by the defendant company, be the same due by second mortgage bonds, judgments or open accounts, ratably and proportionately, in the order in which the same shall be reported by the special master heretofore appointed in in these proceedings and confirmed by this court, to the full extent of the balance of said purchase money, and the balance of said purchase money, if any, shall be paid and distributed to the stockholders of said defendant company ratably and proportionately according to their respective holdings, and said commissioners, prior to the day of sale, shall give bond, with security to be approved by a judge or clerk of this court, conditioned for the faithful performance of their duties under this decree, in the penalty of five thous-

and dollars, and it is further declared not to be the intent and effect of the terms of this decree to determine and establish in any way the order of the rights and priorities of the parties to this cause, or the priority of lien of any claimants or intervenors against the property in these proceedings mentioned, or the proceeds thereof to be brought into court, and the cause is continued for further proceedings. In open court October 10th, 1894.

ROBERT P. DICK,
U. S. Judge.

Endorsed:

Filed in this office Octo. 10, 1894.

SAM'L L. TROGDON, Clerk.

Exceptions to First Mortgage Bondholders to Report of Master.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(276) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf, Oliver and Company et als.
vs.
The Greensboro Water Company et als.

Exceptions on behalf of the holders of the receiver's certificates, of the first mortgage bonds, and of the second mortgage bonds to the report of the Special Master John N. Wilson.

John S. Gittings & Co. and William A. Seddon holders of the receivers certificates in these proceedings mentioned, and the said John S. Gittings & Co., attorneys in fact for the holders of the first mortgage bonds of the Greensboro Water Company set out in these proceedings, and Middendorf, Oliver and Company and other holders of the second mortgage bonds of said Greensboro Water Company as appears in these proceedings, by their attorney and solicitor, Archibald H. Taylor, except to the ratification of the report of the Special Master John N. Wilson, heretofore last filed in these proceedings, in the following particulars and for and for the following reasons:

First. Because said report no where ascertains and finds as a matter of fact, and that there are receivers certificates issued by order of this court and outstanding to the amount of $12,000, bearing six per cent. per annum interest, and that the same are a first lien upon all the

property, revenues, income and franchises in these proceedings mentioned prior to all other liens whatsoever and prior to the lien of the first and second mortgages in these proceedings mentioned.

Second. Because said report does not clearly find and ascertain that the next liens upon said property in order (277) after the liens of the receivers certificates beforementioned are the outstanding first mortgage bonds to the amount of $50,000 principal, the interest thereon having been paid to date, and outstanding second mortgage bonds to the amount of $20,000.00, with interest coupons overdue and unpaid from and including May 1st, 1893, to date, and that the same are liens prior to the liens and claims of all other persons whatsoever, except the lien of the receivers certificates.

Third. Because said report finds and allows certain indebtedness and accounts due by said Greensboro Water Company to the persons and for the amounts mentioned and set out in 10 paragraph of said report as to the facts and the 1st paragraph of conditions of law as liens upon the property, revenues and franchises of said company in the receiver's hands and decreed to be sold in these proceedings prior to the liens of the first and second mortgages in these proceedings mentioned, whereas by law and according to the evidence in this cause the same are unsecured debts of said company, payable only out of the income or proceeds of sale of the property after the payment in full of the receiver's certificates and all the bonds outstanding and issued under the first and second mortgages aforementioned.

Fourth. Because the finding of the said special commissioner set out in the tenth paragraph, that "monies which should have been applied to the payment of current or operating expenses were applied to the payment of the interest on the mortgage indebtedness" is not true, in fact or supported by the evidence and these exceptants say that no monies whatever were taken from the current earnings to pay the interest on the mortgage indebtedness, but that, on the contrary, a large balance of current indebtedness over and above the earnings was paid and discharged from money received from the sale of the second mortgage bonds as appears by the evidence returned with said master's (278) report, and also from the fact disclosed by the receiver's reports that the earnings, though much increased, are not yet sufficient to pay the interest on the bonded indebtedness of the company.

Fifth. And for these and for other further reasons appearing on the face of the proceedings, these exceptants pray that said report be not ratified, but be set aside, corrected and modified in the particulars referred to.

ARCHIBALD H. TAYLOR,
Attorney for Exceptant.

Endorsed:

Filed in this office May 8, 1895.

SAM'L L. TROGDON, Clerk.

Answer of Seddon & Gittings & Co. to Petition of Receiver.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(279) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et als.
vs.
The Greensboro Water Company.

To the Honorable the Judges of said Court:

The answer of William C. Seddon and John S. Gittings & Company, bankers and attorneys in fact for the first mortgage bondholders in these proceedings mentioned, unto the petition and report of James D. Glenn, the receiver in these proceedings mentioned, dated Sept. 19th, 1895, respectfully shows unto your Honors:

1. These respondents state that the first mortgage bonds of the said company are owned largely in their own right by your respondents and others, not owned by your respondents, are owned by persons, customers and clients of your respondents, who have committed their interests in this litigation to your respondents, as their agents or attorneys in fact, so that your respondents represent and control, practically, all of said issue of first mortgage bonds.

2. These respondents admit the matters and facts in said petition set out and alleged and believe that it would be for the advantage of the first mortgage bondholders, as well as for all classes of creditors, and the stockholders of the Greensboro Water Company to make the extension of the mains and pipes and improvements as mentioned in said receiver's petition.

3. These respondents, therefore, consent to the passage of an order by the court authorizing the said receivers to

issue receiver's certificates, which shall be a first charge and lien upon all the estate and property of the said Greensboro water Company, in these proceedings mentioned, to the amount of one thousand dollars, bearing such (280) interest as the court may determine and the proceeds of which shall be expended under the order of the court, in making the improvements and extensions recommended by the receiver in his said petition:

4. And in all particulars, as to the matters alleged and prayed in said petition, these respondents submit themselves to the order and direction of this Honorable Court in the premises.

WILLIAM C. SEDDON,
JOHN S. GITTINGS & CO.

Endorsed:

Filed in this office Sept. 25, 1895.

SAM'L L. TROGDON, Clerk.

Letter of A. H. Taylor.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(281) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et al.
vs.
Greensboro Water Company.

R. R. King, Esq.,

Dear Sir,—The copy of the decree returned herewith appears to me to be to the same effect as the one prepared by me to be passed by the court upon motion of the second mortgage bondholders, and you are requested to show this letter to the court as my formal consent, or, rather, motion for its passage. Inasmuch as you are counsel for the company, and are satisfied with this, and as all other intervenors in the case are provided for in the first place, there is nobody to object and no possible objection to be made. I might suggest that the requirements as to advertising should not be made quite so expensive, by substituting for once a week, twice each thirty days.

Yours truly,

ARCHIBALD H. TAYLOR,
Attorney for Second Mortgage Bondholders.

Decree.

IN THE CIRCUIT COURT OF THE UNITED STATES WESTERN
(282) DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et al.
vs.
Greensboro Water Company et al.

This cause coming on for further orders and decree, upon the bill of complaint, the answer of the trustees, Archibald H. Taylor and R. R. King, the answer of the defendant, the Greensboro Water Co., the reports of the receiver, James D. Glenn, all orders heretofore made, the report of the commissioners to make sale, the report of the Special Master, John N. Wilson, Esq., and all other proceeding in said cause, and same being read and duly considered, it is is found, adjudged and decreed by the court as follows: That at the institution of this suit, and all times prior thereto, and since the commencement of the same, the interest on the first mortgage bonds of the defendant water co. has been paid according to the terms thereof, and that this action was instituted by and in behalf of the second mortgage bondholders for that the defendant water company was and has remained continuously in default on the payment of the interest on said bonds, and the purpose and scope of the action is to foreclose the second mortgage by sale of all the property of defendant water company, subject, however to the first mortgage and the bonds therein secured, the amount of which is $50,000.00.

It is further ascertained and found that, under the order of this court in this cause, the receiver, James D. Glenn, has issued receiver's certificates to the amount of $15,000.00, all of which are now outstanding with a small amount of accrued interest thereon, and that there is due for State, County and municipal taxes the sum of $, all of which constitutes a lien upon the property and assets of the de-
(283) fendant water company.

On considering the report of the special master on the exceptions filed thereto, it is ordered and decreed that the said exceptions be, and the same are hereby, overruled and the said report is in all things confirmed, and the following sums are found therein as due and owing by defendant company, to-wit: $112.00 due F. V. Snell, $1.00 due W. L. Wray, $37.50 due Pinkney Jones, $12.50 due P. L. Price, $24.20 due Smith Donnell, $10.00 due J. A. Hegwood, $103.82 due Sergeant Mfg. Co., $8.00 due W. H. Turner, $32.25 due D. N. Kirkpatrick, $162.06 due Thos.

Woodroffe, $21.60 due The Mt. Airy Granite Co., $141.70 due the Greensboro Brick and Tiling Co., $13.00 due T. N. & R. O. Pickard, $8.00 due W. A. Norwood, $10.00 due Geo. T. Lane, $15.25 due James F. Yates, $36.00 due Daniel McNeil, $35.00 due Pomona Terra Cotta Co., $137.45 due G. W. Alley, Jr., $94.46 due R. G. Glenn, $104.75 due The Glmorgan Co., the sum $100.00 due P. D. Price and the sum of $300.00, with $18.50 cost, due N. A. Jeffreys, with interest on all such claims from the time the defendant company was placed in the hands of the receiver, except the sum due N. A. Jeffreys, which shall bear interest according to the terms of the judgment wherein said sum was recovered, and are declared to be a lien on the property and assets of the defendant company prior to and over the second mortgage bonds.

It further appears to the court that at the sale heretofore ordered of the property and assets of the defendant co. by the said Archibald H. Taylor and R. R. King, commissioners, no bid could be procured; now on motion the order of sale heretofore made is confirmed, and it is decreed by the court that the said creditors referred to above in the report of the special master and the plaintiffs, the second mortgage bondholders, are entitled to have a decree of foreclosure and a sale of the property and assets of the defendant water company, subject only to the lien of the first mortgage in this proceeding mentioned, and to that end the said commissioners are again directed to sell the (284) mortgaged property, being all the property, rights and franchise of the Greensboro Water Company, and all the property and rights in the hands of the receiver, James D. Glenn, and such sale shall be subject to the lien of the first mortgage bonds only, being the same in these proceedings mentioned, and the rights of the defendant body corporate and of all other persons or bodies corporate, claiming under the said defendant water company, shall be and are hereby forever bound and foreclosed and the course and manner of said sale shall be as follows, said commissioners shall give, at least, sixty days notice of time, place and terms of sale by advertising at least once a week in some newspaper published in Greensboro, North Carolina, and in some newspaper published in the City of Baltimore, Md., and such other advertisement as may to said commissioners seem proper and said sale shall be at public auction to the highest bidder by public auction, in front of the United States Court House, in the City of Greensboro in the State of North Carolina, and the terms of the sale shall be as follows: the person being the highest bidder shall pay to said commissioners, at the time of sale,

cash on account of purchase money, the amount of $2,000.00, and immediately upon the confirmation of the sale, which may be reported to this court for ratification in vacation or during term, said purchaser shall pay or deliver to said commissioners, on account of said purchase, cash or receiver's certificates now issued and outstanding under the order of this court in this cause or any of the claims hereinbefore referred to per the commissioner's report as constituting a prior lien upon the property, and the balance of the purchase money may be paid in the second mortgage bonds of the said company to the extent such bonds would *pro rata* in the money arising from said sale were same paid in cash for distribution, and if the bid of the purchaser shall be in excess of the claims against the defendant company, including second mortgage bonds and accrued interest to date of sale, then such balance on account of purchase money shall be paid in cash.

(285) That out of the cash payment required to be made as above, the cost of this action, including allowances made and hereafter to be made, shall be first paid, next, all taxes due by the defendant company, third, the receiver's certificates, with such unpaid interest as may then be due, fourth, the claims of Jeffreys, Snell and others, hereinbefore named, fifth, payment to the holders of the second mortgage bonds with interest in full or ratably if the sum shall not be sufficient, sixth, to the claims mentioned in the 11th paragraph of the special master's report, next to be distributed to the stockholders ratably. The sum of $50.00 is allowed to the Special Master, John N. Wilson, for his report in this cause. This cause is retained for further orders.

ROBT. P. DICK,
U. S. Judge.

R. R. KING, Attorney for Deft. Co.

Endorsed:

Filed in this office Jan'y 26, 1896.

SAM'L L. TROGDON, Clerk.

Report of Commissioners.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(286) WESTERN DISTRICT OF NORTH CAROLINA.

J. W. Middendorf et als.
vs.
The Greensboro Water Co. et als.

To the Hon. Robert P. Dick, Judge of said Court:

The report of Robert R. King and Archibald H. Tay

lor, commissioners of sale heretofore appointed by decree of court in these proceedings, respectfully shows unto the court:

1st. That your commissioners having given bond in the penalty of five thousand dollars, approved by the clerk of this court, conditioned for the faithful performance of their duty under the terms of their appointment aforesaid, proceeded to advertise said property for sale in accordance with the terms of the decree of said court, and did advertise the same once a week for more than sixty days prior to the day of sale in the Daily Record, a newspaper published in the City of Greensboro, and in the Daily News, a newspaper published in the City of Baltimore, Maryland, as appears by a copy of said advertisement herewith filed, and upon the day of sale named in said advertisement, viz.: April 6th, 1896, your commissioners attended in person at the place therein named, at noon, and offered said property at public sale, through J. R. Pearce, a licensed auctioneer, and sold the same to Hugh L. Pope, for himself and associates to be organized as the "Greensboro Water Supply Company," and being the highest bidder therefor, at and for the sum of thirty-one thousand dollars, subject to the lien of the first mortgage bonds in these proceedings mentioned, to the amount of fifty thousand dollars, strictly in accordance with the terms of the decree of said court, and, further, your commissioners report that said Pope has paid to your commissioners the sum of two thousand dollars in cash on account of said purchase money, and offers to fully perform and comply with all (287) the terms of sale in all respcts in accor'ance with the terms of the decree and orders of the court in these proceedings.

Wherefore, your petitioners, having complied with all directions of the court in the premises, pray your Honor to grant a decree of this court finally ratifying and confirming the above reported sale, and in all respects approving their action in the premises. And will ever pray.

ROBT. R. KING,
ARCHIBALD H. TAYLOR,
Commrs.

Order Confirming Sale.

Upon consideration of the foregoing report of Robert R. King and Archibald H. Taylor, commissioners of sale, upon motion of the complainants in these proceedings, by their attorneys of record, and upon consent of the defend-

ant, by its attorneys of reord, in conformity with the previous decree of this court, dated January 26th, 1896, no cause to the contrary being shown, it is this 7th day of April, 1896, by the Circuit Court of the United States for the Western District of North Carolina, ordered, adjudged and decreed that the sale of the property in these proceedings mentioned to Hugh L. Pope for himself and associates to be organized hereafter as the Greensboro Water Supply Company, as reported in the above mentioned report of sale, be, and the same is, in all respects finally ratified, approved and confirmed, and said commissioners of sale are directed to collect and receive the balance of the purchase money from said purchaser strictly in accordance with the terms of the decree and orders of this court heretofore passed relating thereto, and upon the payment of said purchase money in full, according to said terms, and not before, to make a full and sufficient conveyance to said purchaser or his assigns of all the property of any kind whatsoever, and all rights and franchises of the Greensboro Water Company in these proceedings mentioned, and all the property (288) and rights in the possession of the receiver in these proceedings mentioned, and said commissioners are further directed, out of the purchase money received and to be received by them, to pay all the expenses of said sale, including the usual commissions to to themselves for making said sale, subject, however, to the the further and special approval of this court as to said commissions, and all the unpaid costs of this cause, including an allowance to counsel for maturing the proceedings to be further specially approved by this court, and then to apply balance of said purchase money to the payment of the liens against the property in these proceedings mentioned, in the order of the liens heretofore adjudged and established by the decrees and orders of this court, equally and proportionately upon each claim in the class to which said claims may belong and have been assigned, but said commissioners are further directed to return to this court a full and particular account of their receipts, collections, allowances and disbursements as above ordered for the consideration and approval of this court. And this cause is retained for further orders and directions of the in the premises.

ROBT. P. DICK,
U. S. Judge.

Endorsed:

Filed in this office April 8th, 1896.

SAM'L L. TROGDON, Clerk.

Advertisement.

COMMISSIONERS' SALE OF THE GREENSBORO WATER COMPANY.

(289) By virtue of a decree of the Circuit Court of the United States for the Western District of North Carolina, passed in the proceedings entitled J. W. Middendorf et al. *vs.* The Greensboro Water Company, the undersigned commissioners of sale hereby give notice that they will sell at public auction, in front of the United States Court House, in the City of Greensboro, N. C., on April 6th, 1896, same being first Monday in said month, at 12 o'clock, noon, all the property, rights and franchises of the Greensboro Water Company, which are more particularly described as follows, viz.: All the right, title, interests at law and equity, privileges, powers and franchises owned, possessed, exercised and acquired, or hereafter to be possessed, obtained or acquired by the said Greensboro Water Co., under and by virtue of the laws and acts of the General Assembly of the State of North Carolina, and under and by virtue of acts, concessions and permissions of the corporation of the City of Greensboro, and the county officers, authorities or representatives of the County of Guilford, in the State of North Carolina, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, and all the real estate, personalty, rights of way, or other easements or property of any sort or description whatsoever in the State of North Carolina, and wheresoever situated, belonging to the said Greensboro Water Company, as well as that which it may hereafter acquire or own, including particularly all the water works, dams, reservoirs, tanks, pumps, basins, pipes, mains, hydrants and fire plugs, owned or acquired, or hereafter to be owned or acquired, by said Greensboro Water Company, or its successors, and all machinery, engines, tools, implements and materials for constructing, operating or repairing said water works, or any part thereof; also all revenue, rates, rentals, tolls, sums of money and income, arising or to arise from the operation of said water works, and profits of any sort whatsoever.

(290) Terms of sale: The above property will be sold free and clear of all liens for taxes or other charges and expenses of any kind whatsoever—due up to the day of sale—and subject only to the lien, operation and effect of a mortgage or deed of trust made January 10th, 1888, by the said Greensboro Water Company to the "The Guarantee Trust and Safe Deposit Company of Philadelphia, Pa., Trustees," duly recorded in the register's office of Guilford

County, N. C., which mortgage purports to secure the payment of fifty first mortgage bonds of the par value of one thousand dollars each, in all fifty thousand dollars, which mortgage bonds are now issued and outstanding and secured by the terms of said mortgage; and the purchaser, being the highest bidder for said property, subject to the lien aforesaid, shall pay to the undersigned commissioners at the time of sale cash, on account of the purchase money for said property, to the amount of two thousand dollars, and immediately upon the ratification of the sale, which may be reported to said court for ratification immediately after the sale, and purchaser shall pay or deliver to said commissioners of sale, on account of said purchase money, cash or receiver's certificates now issued and outstanding under the orders of said court in said cause to the full amount of said receiver's certificate, being fifteen thousand dollars, or any or all the claims to which a preference over the second mortgage bonds is given by the report of John N. Wilson, Esq., special master, as confirmed by the court; and the balance of said purchase money shall be payable and dischargeable in money or evidences of debt due by the Greensboro Water Company, be the same due by second mortgage bonds, judgments or open accounts, ratably and approportionately in the order which the same shall be reported by the special master heretofore appointed in said proceedings and confirmed by the court to the full extent of the balance of said purchase money.

ROBT. R. KING,
ARCHIBALD H. TAYLOR,
Commissioners of Sale.

Final Report of Commissioners.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN
(291) DISTRICT OF NORTH CAROLINA.

J. W. Middendorf, Oliver and Company and others,
vs.
The Greensboro Water Co. & others.

To the Honorable the Judges of the Circuit Court of the United States, etc.:

The undersigned, heretofore appointed commissioners to make sale of all the assets of the defendant, The Greensboro Water Company, would respectfully refer to their report hereunto made and filed in this action, and in addition thereto would now report that they have paid all the

debts referred to in the report of John N. Wilson, Esq., special master, as directed by this court.

2. That out of the monies paid by the purchasers, all expenses, taxes, etc., incident to this proceedings, which these commissioners were directed to pay, have been so paid, and the receiver's certificates heretofore issued under the order of this court in this cause have been taken up, cancelled and turned over to the said receiver, and all the second mortgage bonds have been taken up and retired.

3. That your commissioners have done and performed all things by this court directed as they understand. Wherefore they would respectfully ask to be discharged.

A. H. TAYMOR, and
R. R. KING, Comm'rs.
By R. R. KING.

Endorsed:

Filed in this office Feb'y 2, 1897.

SAM'L L. TROGDON, Clerk.

Final Decree.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN
(292) DISTRICT OF NORTH CAROLINA.

J. W. Middendorf, Oliver & Co. & others
vs.
The Greensboro Water Company & others.

This cause coming on for further orders and directions, and it appearing to the court that A. H. Taylor and R. R. King have heretofore sold the assets of the defendant, the Greensboro Water Company, to Hugh L. Pope who complied in all things with the terms of said sale, and that, in pursuance to the orders of this court the said commissioners have, out of the proceeds of said sale, paid off all the debts and claims having priority over the second mortgage bonds, and have taken up all the receiver's certificates heretofore issued under the orders of this court, and have satisfied the second mortgage bondholders at whose instance this suit was brought, and have done and performed all other things by them ordered to be done, including a conveyance of said assets to the purchaser, Hugh L. Pope, and that the receiver, James D. Glenn, has done and performed all duties imposed upon him as such receiver, and has filed his final report, and no exception being taken to

the reports of said commissioner nor that of the receiver. Now, on motion, all things by them done are hereby ratified and confirmed, and the said receiver and the said commissioners are hereby discharged, and this cause is directed to go off the docket.

ROBT. P. DICK,
U. S Judge.

Endorsed:

Filed in this office Feb'y 2. 1897.

SAM'L L. TROGDON, Clerk.

EXCEPTIONS TO REPORT OF MASTER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(293) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO.

Guardian Trust & Deposit Company, Complainant,	In Equity.
vs.	
Greensboro Water Supply Company, Defendant.	Number 151.

Exceptions to Report of Master.

The complainant, the Guardian Trust & Deposit Company, excepts to the statement and findings of fact made by the master, Clement Manly, Esq., in the following particulars:

(1) That his findings of fact in regard to the conditions and terms under which Ceasar Cone laid the pipe on Summit avenue, and the balance due him under said contract are erroneous, and the facts are as set out by the exceptions filed by Mr. Cone to the report of the master, and the same are adopted by the complainant as fully as if here repeated.

(2) The master reports under sub-division five that the bonds issued by Greensboro Water Supply Company were to bear interest at the rate of six per cent. per annum, whereas, in fact, the rate was five per cent. per annum.

(3) In the eight division of facts the master finds that the defendant, Greensboro Water Supply Company, after its creation and organization, entered into a contract with the City of Greensboro to supply it and its citizens with water per Exhibit "B," whereas, in fact, there never was any contract between said city and the defendant, and that

Exhibit " B " was made between Mess. Hubbel et als., who subsequently organized the Greensboro Water Company, as may be seen by reference to said exhibit, which is the basis or contract on which Mess. Fisher, Scales and others, who sued on account of damage from fires, base their claims.

4. The master should have found that the judgment (294) rolls in the several cases referred to under his sub-division ten, were filed, except the claim of the Southern Stock Mutual Insurance Company, which simply filed a statement and no proof whatever as to the justness of its claims was made.

5. The Exhibit " B," referred to in sub-division eleven of his findings of fact was, not a contract made by the Greensboro Water Supply Company, but between the city and Mess. Hubbell et als., as may be seen by reference thereto, and the finding of the master that the defendant was operating under said contract when the fires therein referred to occurred, is inaccurate.

The complainant respectfully asks leave to further specify and except when the further report of the master is made and filed in this cause.

BYNUM & BYNUM,
Attorneys for Complainant.

Endorsed:

Filed in this office August 31st, 1901.

SAM'L L. TROGDON, Clerk.

ENTRY OF APPEARANCE OF GUARANTEE TRUST & DEPOSIT CO., AND ORDER MAKING SAME PARTY RESPONDENT AND ALLOWING 30 DAYS TO FILE PLEADINGS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(295) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Co. of Maryland, Complainant, *vs.* The Greensboro Water Supply Company, Defendant.	In Equity. No. 151.

This cause coming on to be heard in open court in Greensboro, N. C., upon an order of this court made the 29th day of July, 1901, and the further order made on the

7th day of August, 1901, directing process to be issued making the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee, a party to these proceedings:

Now, in pursuance of said notice, comes the said Guarantee Trust and Safe Deposit Company of Philadelphia, trustee, as aforesaid, through its counsel, Messrs. Bynum and Bynum and enters an appearance and submits to the jurisdiction and claims of the court in this cause and asks time in which to file pleadings setting up its rights and claim to the fund in controversy in this action.

BYNUM & BYNUM,
Attys. for the Guarantee Trust & Safe Deposit Company.

In accordance with the foregoing motion, it is ordered and decreed that the said Guarantee Trust & Safe Deposit Co. of Philadelphia, trustee, be set down as a party respondent in this cause and be allowed 30 days in which to file pleadings as it may be advised.

CHARLES H. SIMONTON,
U. S. Circuit Judge,
JAS. E. BOYD,
Sept. 3rd, 1901. U. S. District Judge,
Presiding.

Endorsed:

Filed in this office Sept. 3rd, 1901.

SAM'L L. TROGDON, Clerk.

ORDER DIRECTING CONSUMMATION OF SALE TO CITY AND MATTERS INCIDENT THERETO.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(296) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company, of Maryland, Complainant, *vs.* The Greensboro Water Supply Company, Defendant.	In Equity. No. 151.

This cause coming on to be heard in open court in Greensboro, N. C., upon an order of this court made on the 29th day of July, 1901, directing the City of Greensboro, B. J. Fisher, Helen G. Brown, the Southern Stock Mutual Insurance Company, A. A. Hinkle, A. M. Scales, assignee of A. A. Hinkle, and A. M. Scales, assignee of Hodgin, Pegram & Co., to show cause, if any they have, why the

City of Greensboro should not comply with its proposition to purchase what is known as the Greensboro Water Works property, in these proceedings mentioned, by paying over to the receiver of said property the seventy-five thousand dollars ($75,000) offered to be paid for said property, including the Summit Avenue addition, and why the said city should not take a title thereto, and it appearing to the court that the said B. J. Fisher, Helen G. Brown, the Southern Stock Mutual Insurance Company, A. A. Hinkle, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram & Co., Ceasar Cone and the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee in a certain mortgage executed by the Greensboro Water Company on the 10th day of January, 1888, have been made and have come in and are now parties to this proceeding, and no sufficient cause being shown why the said sale shall not in all things be confirmed and the litigation over and claims upon and against the property be transferred from the property to the proceeds of sale, to-wit: seventy-five thousand dollars, $75,000, less two thousand and sixteen and 73-100 dollars, hereinafter directed to be paid to Ceasar Cone.

(297) It is now, on motion, ordered, adjudged and decreed by the court that the said sale be, and the same is hereby, in all things ratified and confirmed, and the said City of Greensboro is hereby directed to pay over to R. R. King, the receiver appointed by this court, the said purchase price, to-wit: Seventy-five thousand dollars ($75,000), and the said receiver, coincident therewith, is directed to make a title to the said City of Greensboro whereby the property and franchises of the said defendant, the Greensboro Water Supply Company, and the Greensboro Water Company, shall be transferred and conveyed to the said City of Greensboro in accordance with, and as provided by, an order of this court made on the 18th day of July, 1901, and that the money so received and paid into court shall be held and substituted for, and take the place of the said property so transferred to the said city, and all rights in and to the claims upon or against said property shall be transferred to and held against the proceeds of said sale, to the same extent and in like manner as if the property had not been sold.

It is further ordered and decreed that Ceasar Cone, the present owner of the pipes, etc., known as the Summit avenue addition, be, and he is hereby, ordered and directed to make a title to the said City of Greensboro, conveying said pipe, etc., and coincident therewith, the receiver, R. R. King, is hereby ordered and directed to pay over to the

said Cone out of the seventy-five thousand dollars ($75,000), sum two thousand and sixteen dollars and seventy-three cents, $2,016.83, the original cost of said addition, this in accordance with the contract between said Cone and the defendant Water Supply Company.

The said receiver is hereby ordered and directed to hold the said seventy-five thousand dollars ($75,000) less the two thousand and sixteen and 73-100 dollars, hereinbefore ordered to be paid to said Cone.

It is further ordered by the court that B. J. Fisher, (298) Helen G. Brown, the Southern Stock Mutual Insurance Company, A. A. Hinkle, A. M. Scales, assignee of A. A. Hinkle, and A. M. Scales, assignee of Hodgin, Pegram and Company, each have 30 days in which to file pleadings setting up their claims to the fund coming into the hands of the receiver under this order, and the respondent, the Guarantee Trust and Safe Deposit Company of Philadelphia, have 30 days in which to file its answer setting forth its rights and claims in and to said fund.

The receiver, on receipt of the money herein referred to, shall make report to this court of such fact, and this cause is retained for further orders and directions.

In open court, in Greensboro, this the 3rd day of September, 1901.

CHARLES H. SIMONTON,
U. S. Circuit Judge,
JAS. E. BOYD,
U. S. District Judge,
Presiding.

Sept. 3rd, 1901.

Endorsed:

Filed in this office Sept. 3, 1901.

SAM'L L. TROGDON, Clerk.

ANSWER TO RULE BY A. M. SCALES, ASSIGNEE OF A. A. HINKLE, CREDITOR.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF No. (299) CA., IN THE CIRCUIT COURT, AT GREENSBORO, N. C.

Guardian Trust and Deposit Co.,
Complainant,
vs.
Greensboro Water Supply Company.

The undersigned creditor of the Greensboro Water Supply Co., by and through their attorney, answering the

two several rules heretofore served upon them by direction of this Honorable Court to show cause why the sale of the property, franchise and holdings of the Greensboro Water Supply Co., should not be sold to the City of Greensboro for the sum of $75,000.00 and the proceeds thus derived from such sale be substituted for and held by the court in lieu of the Water Works property, and to make proof of claims against said property and stating our contentions as to priority of payment, says:

That since the rules of this Honorable Court heretofore referred to was made upon us, the sale of the water works property to the City of Greensboro for $75,000, seventy-five thousand dollars, has been completed and confirmed by this Honorable Court. We, therefore, deem it unnecessary to make answer to that part of the rule regarding the sale of same. To that portion of the rule requiring claimant to show to this Honorable Court the facts upon which he claims priority of payment out of the property and funds of the Greensboro Water Supply Company, first reserving unto himself and all of the rights, title and interest acquired and now existing under and by virtue of the laws of the State of N. C. and the decision of the court, say: That in the year ——— the Greensboro Water Supply Co., a domestic corporation, acting and doing business in the City of Greensboro, damaged the claimant, resident of said city by wilfully, carelessly and negligently failing and refusing to furnish a sufficient water pressure at its hydrants in said city to extinguish a fire as it had obligated, (300) and was paid to do, whereby claimant's property was destroyed. That your claimant thereafter, to-wit: on the 13th day of August, 1897, began a civil action for damages against the defendant corporation by sueing out a summons in the Superior Court of Guilford County, in which cause they filed a duly verified complaint asking for damages against the defendant water supply co., for the tortious injury done them. The water supply company duly answered and resisted judgment. At the January special term, 1901, of the Superior Court of Guilford County the jury rendered a verdict for the plaintiff, judgment reciting the issues found by the jury was then and there signed by the judge presiding, in the sum of $3,200.00. Which judgment is now on docket in the office of the clerk of the court for Guilford County, a certified copy of which has been heretofore filed with Clement Manly, Esq., special master, appointed by this court to take testimony herein. This judgment, by consent of parties, has been modified by the court rendering it in conformity to the ruling of the Supreme Court of N. C. in the case of Fisher *vs.* Greens-

boro Water Supply Company. Which said opinion of the Supreme Court of N. C. is asked to be taken as a part of this answer. And a certified copy of the judgment in this case, as modified, is hereto attached and prayed to be taken as a part of this answer.

1. That subsequent to the institution of the said suit by the plaintiff against the defendant corporation, and before the trial of the cause, as aforesaid, to-wit: on the — day of ———, 1900, the defendant was placed in the hands of R. R. King, Esq., as receiver, who, prior to his appointment as receiver, was counsel for the defendant corporation in this said suit, and tried the case at the special term, 1901, Guilford Superior Court, as such counsel.

2. That the said judgment was obtained and acquired before a court of competent jurisdiction, both as to the (301) parties and the subject matter in controversy, and, as he is informed and believes, in law is conclusive.

3. That the judgment thus obtained by the undersigned, and properly docketed in the Superior Court of Guilford County, as he is advised and believes, is a judgment in tort, and by virtue of Section 1255 of the Code of North Carolina, takes priority over all other debts, mortgages, liabilities and bonds of said water supply co., besides being a lien since docketed under the general law of the State, upon all the property of the said water supply company.

4. That mortgages under which the bondholders claim, and those for the foreclosure of which the bill of complaint in this action is filed, were made and executed by the Greensboro Water Company and the Greensboro Water Supply Company, respectively, both State corporations, and were so made and executed subsequent to the legislative enactment above referred to, to-wit: Section 1255, and which obligations under law are void as to the undersigned.

A. M. SCALES,
Assignee of A. A. Hinkle &
A. A. HINKLE,
By A. L. BROOKS,
Attorney.

Endorsed:

Filed in this office Sept. 27, 1901.

SAM'L L. TROGDON, Clerk.

NORTH CAROLINA, } Superior Court,
(302) Guilford County. } September Term, 1901.

A. M. Scales, Assignee of A. A. Hinkle, and A. A. Hinkle,
vs.
Greensboro Water Supply Company.

In this cause it appearing to the court that pending an appeal to the Supreme Court by the defendant from a judgment rendered against it at the January Special Term, 1901, of Guilford Superior Court, a similar case for damages against the defendant company, to-wit: B. J. Fisher *vs.* The Greensboro Water Supply Company, has been heard and finally determined by the Supreme Court, by which appeal and opinion of the court all of the questions involved in the appeal in this case have been adjudicated, and defendant, therefore, having withdrawn its appeal from the judgment heretofore entered in this case upon the agreement with counsel for the plaintiffs that judgment might be entered herein correcting the judgment of the Superior Court as directed by the opinion of the Supreme Court in the Fisher appeal, it being mutually understood between the parties that the withdrawal of appeal, and the consent to correction of judgment, shall not bind or preclude any further than would have been done by an appeal and judgment of the Supreme Court directing the corrections as stated in the case of Fisher *vs.* Greensboro Water Supply Co.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiffs recover of the defendant, Greensboro Water Supply Co., the sum of thirty-two hundred dollars ($3,200) for the tortious injury and damage done him by the negligence of the defendant corporation, and for the cost of this action.

THOS. J. SHAW,
Judge Presiding.

NORTH CAROLINA, }
(303) Guilford County. }

I, John J. Nelson, Clerk of the Superior Court of Guilford County, N. C.. do hereby certify that the foregois a true and exact copy of the final judgment in the above entitled cause which was instituted in this court on August 13th, 1897, and now on record in my office.

[Seal] JOHN J. NELSON, C. S. C.

Endorsed:

Filed in this office Sept. 27, 1901.

SAM'L L. TROGDON, Clerk.

ANSWER TO RULE BY A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., CREDITORS.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF VA., IN THE CIRCUIT COURT, AT GREENSBORO, N. C.

No. (304)

Guardian Trust and Deposit Co., Complainant,
vs.
Greensboro Water Supply Co.

The undersigned creditor of the Greensboro Water Supply Co., by and through their attorney, answering the two several rules heretofore served upon them by direction of this Honorable Court to show cause why the sale of the property, franchise and holdings of the Greensboro Water Supply Co., should not be sold to the City of Greensboro for the sum of $75,000.00 and the proceeds thus derived from such sale be substituted for and held by the court in lieu of the Water Works property, and to make proof of claims against said property and stating our contentions as to priority of payment, says:

That since the rules of this Honorable Court heretofore referred to was made upon us, the sale of the water works property to the City of Greensboro for $75,000, seventy five thousand dollars, has been completed and confirmed by this Honorable Court. We, therefore, deem it unnecessary to make answer to that part of the rule regarding the sale of same. To that portion of the rule requiring claimant to show to this Honorable Court the facts upon which he claims priority of payment out of the property and funds of the Greensboro Water Supply Company, first reserving unto himself and all of the rights, title and interest acquired and now existing under and by virtue of the laws of the State of N. C. and the decision of the court, say: That in the year 1897 the Greensboro Water Supply Co., a domestic corporation, acting and doing business in the City of Greensboro, damaged the claimant, resident of said city, by wilfully, carelessly and negligently failing and refusing to furnish a sufficient water pressure at its hydrants in said city to extinguish a fire, as it had obligated, (305) and was paid to do, whereby claimant's property was destroyed. That your claimant thereafter, to-wit: on the 13th day of August, 1897, began a civil action for damages against the defendant corporation by sueing out a summons in the Superior Court of Guilford County, in which cause he filed a duly verified complaint asking for damages against the defendant water supply co., for the tortious injury done him. The water supply company duly answer-

ed and resisted judgment. At the January special term, 1901, of the Superior Court of Guilford County the jury rendered a verdict for the plaintiff, judgment reciting the issues found by the jury was then and there signed by the judge presiding, in the sum of $1,800.00. Which judgment is now on docket in the office of the clerk of the court for Guilford County, a certified copy of which has been heretofore filed with Clement Manly, Esq., special master, appointed by this court to take testimony herein. This judgment, by consent of parties, has been modified by the court rendering it in conformity to the ruling of the Supreme Court of N. C. in the case of Fisher *vs.* Greensboro Water Supply Company. Which said opinion of the Supreme Court of N. C. is asked to be taken as a part of the answer. And a certified copy of the judgment in this case, as modified, is hereto attached and proper to be taken as a part of this answer.

1. That subsequent to the institution of the said suit by the plaintiff against the defendant corporation, and before the trial of the cause, as aforesaid, to-wit: on the — day of ———, 1900, the defendant was placed in the hands of R. R. King, Esq., as receiver, who, prior to his appointment as receiver, was counsel for the defendant corporation in this said suit, and tried the case at the special term, 1901, of Guilford Superior Court, as such counsel.

2. That the said judgment was obtained and acquired before a court of competent jurisdiction, both as to the parties and the subject matter in controversy, and, as he is informed and believes, in law is conclusive.

(306) 3. That the judgment thus obtained by the undersigned, and properly docketed in the Superior Court of Guilford County, as he is advised and believes, is a judgment in tort, and by virtue of Section 1255 of the Code of North Carolina, takes priority over all other debts, mortgages, liabilities and bonds of said water supply co., besides being a lien since docketed under the general law of the State, upon all the property of the said water supply company.

4. That mortgages under which the bondholders claim, and those for the foreclosure of which the bill of complaint in this action is filed, were made and executed by the Greensboro Water Company and the Greensboro Water Supply Company, both State corporations, and were so made and executed subsequent to the legislative enact-

ment above referred to, to-wit: Section 1255, and which obligations under law are void as to the undersigned.

A. M. SCALES,
Assignee of Hodgin, Pegram & Co., &
HODGIN, PEGRAM & CO.,
By A. L. BROOKS.

NORTH CAROLINA, } Superior Court,
Guilford County. } September Term, 1901.

A. M. Scales, Assignee of Hodgin, Pegram & Co., and Hodgin, Pegram & Company,
vs.
Greensboro Water Supply Company.

In this cause it appearing to the court that pending an appeal to the Supreme Court by the defendant from a judgment rendered against it at the January Special Term, 1901, of Guilford Superior Court, a similar case for damages against the defendant company, to-wit: B. J. Fisher *vs.* The Greensboro Water Supply Company, has been heard and finally determined by the Supreme Court, by (307) which appeal and opinion of the court all of the questions involved in the appeal in this case have been adjudicated, anddefendant having, therefore, withdrawn its appeal from the judgment heretofore entered in this case upon the agreement with counsel for the plaintiffs that judgment might be entered herein correcting the judgment of the Superior Court as directed by the opinion of the Supreme Court in the Fisher appeal, it being mutually understood between the parties that the withdrawal of appeal, and the consent to correction of judgment, shall not bind or preclude defendant any further than would have been done by an appeal and judgment of the Supreme Court directing the corrections as stated in the case of Fisher *vs.* Greensboro Water Supply Co.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiffs recover of the defendant, the sum of eighteen hundred dollars ($1,800) for the tortious injury and damage done him by the negligence of the defendant corporation, and for the costs of this action.

THOS. J. SHAW,
Judge Presiding.

NORTH CAROLINA, }
Guilford County. }

I, John J. Nelson, Clerk of the Superior Court of

Guilford County, N. C., do hereby certify that the foregois a true and exact copy of the final judgment in the above entitled cause which was instituted in this court on August 13th, 1897, and now on record in my office.

[Seal] JOHN J. NELSON, C. S. C.

Endorsed:

Filed in this office Sept. 27, 1901.

SAM'L L. TROGDON, Clerk.

ANSWER TO RULE BY B. J. FISHER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(308) WESTERN DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.
} In Equity.

For answer to the rule to show cause issued by this Honorable Court on the 29th day of July, 1901, "Why the City of Greensboro shall not comply with its proposition to purchase what is known as the Greensboro Water Works, etc., and especially why the said city shall not take a deed for the said property, and pay over the purchase price proposed and accepted by this court," heretofore served upon him, B. J. Fisher, a judgment creditor of the above named defendant company, reserving to himself, every and singular, all rights or lien, or other rights, or interests, which have heretofore, or do now exist, or attach to his said judgment, or are incident thereto, by virtue of the laws of the laws of the State of North Carolina, or otherwise, respectfully showeth unto your Honors:

1. That, in the month of June, 1899, the defendant corporation then engaged in the business—for compensation—of furnishing to the City of Greensboro, and the inhabitants thereof, the necessary supply of water for domestic and fire purposes, negligently failed to perform the duty and obligation imposed upon it, whereby the property of the said B. J. Fisher, an inhabitant and tax payer of the City of Greensboro, was destroyed by fire for lack of water, and water pressure, to extinguish the same, and he, the said B. J. Fisher, was greatly damaged by the tortious negligence and carelessness of the said company.

2. Subsequently thereafter, to-wit: on the 20th day of

July, 1899, the said B. J. Fisher, began a civil action in (309) the Superior Court of the County of Guilford, State of North Carolina, against the defendant corporation for the recovery of damages for the tortious injury sustained by him, by reason of the negligence of the defendant corporation; and sued out a summons in the Superior Court, returnable at the —— term, 1899. The defendant corporation duly entered an appearance and filed answer to the complaint of the plaintiff, and the trial of the cause, in the due course of the court, was continued from term to term, until the special term of said court held in January, 1901, when the case was regularly tried before a jury upon issues submitted, which issues were found by the jury in favor of the plaintiff, B. J. Fisher, and against the defendant corporation, and assessed his damages in the sum of $25,000, upon which verdict the court rendered a judgment (reciting the issues so found by the jury) in favor of the plaintiff and against the defendant corporation in the sum of $25,000. The plaintiff appealed to the Supreme Court of the State from the judgment thus rendered, upon the ground that he was entitled to a judgment for tort against the defendant corporation, which contention was sustained by the Supreme Court of the State, and, at the February term, 1901, of said Supreme Court, a judgment final for tort was rendered by said court in favor of the plaintiff, Fisher, a copy of which judgment has heretofore been filed with the special master in this case, and likewise attached hereto and prayed to be taken as part of this answer.

3. That subsequent to the institution of the said suit by the plaintiff, Fisher, against the defendant corporation, and before the trial of the cause, as aforesaid, to-wit: on the 19th day of September, 1900, the defendant corporation was placed in the hands of R. R. King, Esq., as receiver, who, prior to his appointment as receiver, was counsel for the defendant corporation in the said suit with Fisher, and tried the case at the special term, January, 1901, as such (310) counsel, and likewise participated in the argument on appeal in the Supreme Court of the State at Raleigh.

4. That the judgment of the said Fisher was obtained and acquired before a court of competent jurisdiction, both as to the parties and the subject matter in controversy, and, as he is informed and believes, in law, is conclusive.

5. That under Section 1255 of the Code of North Carolina (it being an act of the General Assembly of the State passed at its session in 1879) mortgages made by an

incorporated company upon its property or earnings, whether in bonds or otherwise, thereafter issued, shall not have power to exempt the property or earnings thus mortgaged from execution or satisfaction of any judgment obtained in the courts of this State against said corporation for torts committed by it, its agents or employees, for injury to property. That the judgment of the said B. J. Fisher is for a tort for injury to his real property.

6. That the mortgages under which the bondholders claim, and for the foreclosure of which the bill of complaint in this action is filed, were made and executed by the Greensboro Water Company and the Greensboro Water Supply Company, both State corporations, and were so made and executed subject to the legislative enactment above referred to, and by operation of law are void as to the judgment of the said Fisher.

7. That on the——day of February, 1901, the said judgment of the said Fisher was duly docketed in the Superior Court of Guilford County aforesaid, and from that date became a lien on the water works property, which lien, it is respectfully submitted by the said Fisher, has a priority over the bonds issued in pursuance of the mortgages above referred to, and any other mortgage or mortgages which may have been made upon said water works subsequent to the passage of the Act of 1879

The said Fisher, not being a party to the contract between the receiver and the municipal authorities of the City of Greensboro, is advised by counsel that it is not incumbent upon him to participate is said transactions, other-
(31½) wise than to inform this Honorable Court of the nature and character of his said judgment, and his rights thereunder and incident thereto.

This the 27th day of September, 1901.

Respectfully submitted,

B. J. FISHER,
Judgment Creditor.
By JOHN N. STAPLES
& A. L. BROOKS,
Attorneys.

NORTH CAROLINA, Supreme Court. } February Term, 1901.
No. 185, Guilford County.

B. J. Fisher
vs.
Greensboro Water Supply Co. } Judgment.

This cause coming on to be argued upon the transcript

of the record from the Superior Court of Guilford County, upon consideration whereof this court is of opinion that there is error in the record and proceeding of said Superior Court.

It is, therefore, considered and adjudged by the court here that the opinion of the court, as delivered by the Honorable Chas. A. Cook, Justice, be certified to the said Superior Court to the intent that proceedings be had therein according to law as declared in said opinion.

And it is considered and adjudged further that the defendant do pay the costs of the appeal in this court incurred, to-wit: the sum of thirty-four .05-100 ($35. 05) dollars and let the execution issue therefor.

[Seal] THOS. S. KENAN,
Clerk of the Supreme Court.

N. C. Supreme Court, Feb. Term, 1901, No. 185, Guilford County.

B. J. Fisher, appellant *v.* Greensboro Water Supply Co.

A. L. Brooks and J. N. Staples for appellant, King & Kimball and Bynum and Bynum for appellee.

(312) Cook, J. There is but one question presented: Was the plaintiff entitled to judgment *ex contractu* or *ex delicto*? Which depends solely upon the nature of the action as brought—whether for a breach of contract or for negligent injuries.

The rule is that where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation and a consequent damage, an action on the case founded on the tort is the proper action, Bond *vs.* Hilton, 44 N. C., 310; Robinson *v.* Threadwell, 35 N. C., 41; Solomon *v.* Bates, 118 N. C., 315.

The plainant alleges that defendant had obligated itself (among other things) to furnish the City of Greensboro an ample supply of water, and the necessary machinery, engines, appliances etc., for protection against fire; that he, an inhabitant and tax payer of said city, owned the Benbow House, a four story hotel there situate, which was burned in June, 1899, "and that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the City of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the City of Greens-

boro and its inhabitants for a stipulated price, which was paid to it by said city, and derived by said city from taxation on the inhabitants thereof, and particularly on the plaintiff, a property owner, as aforesaid, and a tax-payer in the said City of Greensboro, and by reason of the said wilful, tortious, culpable reckless and gross negligence of the said defendant company, and by reason of its failure and omission to perform its contractual, as well as its public obligations and duties to the said City of Greensboro and its inhabitants, and especially toward the plaintiff in this action, in that it wholly failed and carelessly and negligently refused to furnish the said hydrants in and about the said hotel, as hereinbefore set forth, with a sufficient pressure of water to extinguish the said fire before the (313) same had greatly damaged and effectually destroyed and injured a greater part of the said building, and by reason of such tortious, negligent and careless conduct on the part of the said defendant company the plaintiff was damaged *on* the sum of forty thousand dollars.

"XVI. The plaintiff is advised, and so alleges, that the defendant company negligently failed to perform its obligations to the said City of Greensboro and its inhabitants and tax-payers, and especially toward the plaintiff in this action, by carelessly, wilfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said City of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied.

"XVII. The plaintiff alleges that the defendant company negligently and carelessly failed to keep its pumping engine ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in fact, it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned.

"XVIII. That there was sufficient hydrants in and near said hotel property to amply furnish a sufficient quantity of water to have extinguished the said fire if there had been a sufficient pressure upon the same, whereby the water could have been utilized by the fire department, but by reason of the lack of pressure the said fire department, as hereinbefore stated, was wholly unable to arrest the flames in their ravages of the building and property of the plaintiff, but stood helpless and impotent to extinguish the said fire

and save the said property of the plaintiff from the great damrge and destruction which thereby ensued.

"XIX. That the omissions and failure of the said defendant company to perform its duty and obligations, as hereinbefore set out, and its gross negligence in failing to supply a sufficient water pressure to meet the exegincies and neces-
(314) sities of the occasion, which was its bounded duty to do, both under the contract as hereinbefore stated, as well as the benefits derived and enjoyed by it by the license and privileges granted to it by the said City of Greensboro and its inhabitants, the property of the plaintiff was almost wholly destroyed, greatly to his damage, in the sum of forty thousand dollars ($40,000.00).

"XX. That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor.

"Wherefore the plaintiff demands judgment against the defendant, The Greensboro Water Supply Company for the sum of forty thousand dollars, damages and the costs of this action, and for such other and further relief as in law or equity he may be entitled."

Which was denied and the following are the issues submitted to the jury, and their findings, viz.:

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract as set out and described in the complaint in the quantity and for the purposes set out? Answer. Yes.

2. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. Yes.

3. Did the defendant company fail to comply with its contract? Answer. Yes.

4. Was the plaintiff injured by the negligence of the
(315) defendant? Answer. Yes.

Upon said verdict the plaintiff moved for a judgment "for the tortious injury and damage done him by the negligence of the defendant," which was refused by his Honor, who entered judgment for damage as upon breach of contract, to which plaintiff excepted and appealed.

We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff so declared. He stated the facts out of which the legal obligation arose fully, and also the obligation itself, and the breach of it and the damage resulting from that breach. Chitty on Pleading, Vol. 1, p. 155; Thompson on Corporations, Vol. 5, Sec. 6340. The case of Coy *vs.* Indianapolis Gas Co., 36 Lawyer's Reports Annotated, p. 535, is to the same effect, and very similar in facts. In that case the defendant had obligated to supply the town of Haughville and its inhabitants with natural gas. By reason of defendant's negligence and failure to supply the needed gas for fuel during severe winter weather, the plaintiff's child died, on account of which the action was brought. The court there held that the failure to perform such obligations was in itself a tort and sustained the action.

While common law judgments do not contain any of the precedent facts of proceedings on which they are based and are comprised of those words only which explain the idea with utmost accuracy and brevity, yet, under our system of pleading and practice, courts are required to frame their judgments so as to determine all the rights of the parties, as well equitable as legal, Hutchinson *v.* Smith, 68 N. C., 354. And being a final determination, should contain every element of the action necessary to enable the successful party to obtain the fullness of his recovery. (316) The defendant in this action is an incorporated company and the plaintiff insists that, under section 1255 of the Code, an execution issued upon a judgment founded on an action for tort has superior advantages, in its enforcement, over executions issued upon judgments founded upon contracts. As to this, however, we do not express an opinion as that question is not before us.

Let the judgment of the court below be entered according to this opinion. Error.

A true copy.

[Seal] THOS. S. KENAN, C. S. C.

STATE OF NORTH CAROLINA, Guilford County. } Superior Court.

I, John J. Nelson, Clerk of the Superior Court for said county, do hereby certify the foregoing (three sheets) to be a true and correct copy of the opinion of the Supreme Court in the action between B. J. Fisher and The Greensboro Water Supply Company *Company*, as same appears on file in this office.

In witness whereof, I have hereunto set my hand and seal on this the 30th day of September, 1901.

[Seal] JNO. J. NELSON,
Clerk Superior Court.

NORTH CAROLINA, Guilford County. } Superior Court. June Term, 1901.

B. J. Fisher
vs.
Greensboro Water Supply Co. } Judgment.

This cause again coming on to be heard, and it appearing from the opinion of the Supreme Court rendered in said cause and now on file in the clerk's office of this county that the plaintiff's action for damages against the defendant company was founded upon a tort committed by such corporation, whereby the plaintiff was damaged in the de-
(317) struction of his property, and that the findings of the jury upon the evidence adduced entitled the plaintiff to judgment accordingly.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiff, B. J. Fisher, recover of the defendant, Greensboro Water Supply Company, the sum of twenty-five thousand thousand dollars ($25,000.00) for the tortious injury and damage done him by the negligence of the defendant corporation, and for the cost of this action.

W. B. COUNCIL,
Judge Presiding.

STATE OF NORTH CAROLINA, Guilford County. } Superior Court.

I, John J. Nelson, Clerk of the Superior Court for said county, do hereby certify the foregoing to be a true copy of the final judgment in the case of B. J. Fisher *vs.* The Greensboro Water Supply Company, as same appears on record and file in this office.

Witness my hand and seal this the 30th day of Sept., 1901.

[Seal] JNO. J. NELSON,
Clerk Superior Court.

Endorsed:

Filed in this office Sept. 30, 1901.

SAM'L L. TROGDON, Clerk.

ANSWER TO RULE BY HELEN G. BROWN, CREDITOR.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(318) WESTERN DISTRICT OF NORTH CAROLINA.

The Guardian Trust and Deposit Company, *vs.* Greensboro Water Supply Company.	Answer of Helen G. Brown.

Helen G. Brown, in answer to the notice heretofore served upon her, most repectfully showeth to the Court:

I. That she was the owner of a large store building in the City of Greensboro, N. C., which was destroyed by fire on the 29th day of May, 1897, through the negligent and wrongful conduct of the defendant, the Greensboro Water Supply Company, said company having failed to perform the duties and obligations imposed upon it under a contract made with the City of Greensboro by Hubbell, Hinchman and Taylor, the duties of which contract were assumed by the Greensboro Water Company, its predecessor, and afterwards by the defendant company.

II. That subsequently she began an action in the Superior Court of Guilford County against said company, a corporation created under and by virtue of the laws of the State of North Carolina, for the wrongful and tortious conduct of the said company, and upon the trial of said action, the jury having found the issues submitted to them in favor of the plaintiff, and having assessed the damages sustained by the plaintiff at $3,000.00, a judgment was signed in favor of the said Brown for the sum of $3,000 00 by the judge presiding, his Honor, however, refusing to sign the judgment tendered him by the said Brown, because of the form thereof, the said Brown appealed to the Supreme Court of North Carolina.

That pending said appeal, the said Supreme Court having handed down an opinion in the case of B. J. Fisher *vs.* the same defendant, which was decisive of all the ques-
(319) tions involved in the appeal of said Brown, a consent decree thereafter was signed by said Superior Court in favor of the said Brown for the sum of $3,000.00 for the wrongful, tortious and negligent conduct of the defendant

company, copies of both of which judgments are hereto attached and asked to be taken as a part of this answer.

III. That after the said Brown had brought her action in the Superior Court of Guilford County, and while the same was still pending therein, this court, upon application to it on the 19th day of September, 1900, in this action appointed Robert R. King its receiver of all the property, effects, rights and franchises of the defendant, the Greensboro Water Supply Company.

IV. That the said judgment of the said Brown was obtained in a court of competent jurisdiction, having jurisdiction of both the parties and the subject matter, and the said Brown is advised and alleges, is conclusive.

V. That the said Brown is advised and alleges that, by virtue of Sec. 1255 of the Code of North Carolina, mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in courts of the State against such incorporation for labor performed, nor for torts committed by such incorporation, its agent or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding. And that both the mortgage given by the defendant company and the mortgages given by the Greensboro Water Company, having been given after the enactment of said section of the Code of North Carolina, and the bondholders secured by the mortgages given by the Greensboro Water Company having been parties to the action of Middendorf, Oliver & Co. and others against the Greensboro Water Company, and consenting to the decree therein made selling all the property, effects, rights and privileges of the Greensboro Water Company to Hugh L. Pope and his associates to be incorporated into a (320) company known as the Greensboro Water Supply Company, that all of said mortgages are void and of no effect as against an execution issued to satisfy the said judgment obtained by said Brown in the Superior Court aforesaid.

VI. That the said Brown is further advised and alleges that she has a priority over said mortgage indebtedness of the Greensboro Water Company and the Greensboro Water Supply Company to the satisfaction of her judgment of $3,000.00 and interest and costs in the fund now in the hands of the court derived from the sale of the

property, effects, rights and privileges of the Greensboro Water Supply Company to the City of Greensboro, made by the receiver of the Greensboro Water Supply Company appointed in this clause. That all laws of a State existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory upon all courts which assume to give remedy on such contracts and that section 1255 of the Code of North Carolina became and was a part of all the mortgages executed against the property of the Greensboro Water Co. and the Greensboro Water Supply Co. and is obligatory upon the court assuming to give remedy under any of said mortgages.

Wherefore, the said Helen G. Brown, having advised this Honorable Court of what she conceives to be her rights under and by reason of the judgment obtained in the Superior Court of Guilford County, she prays that she may receive out of the fund in the hands of the court the amount of her judgment, interest and costs, and for such other and further relief as she may be entitled to.

JOHN N. WILSON,
L. M. SCOTT,
Attorneys.

NORTH CAROLINA, Guilford County. } In the Superior Court, Special Term, January, 1900.

(321) Helen G. Brown *vs.* Greensboro Water Supply Co. } Judgment.

This action coming on for trial and being heard before his Honor Judge Timberlake and a jury, and the following issues having been submitted to and answered by the jury, to-wit:

I. Was the plaintiff, Helen G. Brown, the owner of the store house and property which was destroyed by fire, as alleged in the complaint? Answer. Yes.

II. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, as set out and described in the complaint, in the quantity and for the purposes set out? Answer. Yes.

III. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement,

and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. Yes.

IV. Did the defendant company fail to perform its duty under said agreement by means of which plaintiff's house and property were destroyed by fire and damages done her? Answer. Yes.

V. Was the plaintiff injured by the negligence of the defendant? Answer. Yes.

VI. What damages, if any, did the plaintiff sustain in consequence thereof? Answer. $3,000.00.

It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff, Helen G. Brown, do recover of the defendant, the Greensboro Water Supply Company, the sum of three thousand dollars as damages, together with the costs of this action to be taxed by the clerk.

(Signed) E. W. TIMBERLAKE,
Judge Presiding.

(322) NORTH CAROLINA, Guilford County } Superior Court, September Term, 1901.

Helen G. Brown
against
Greensboro Water Supply Company. } Judgment.

In this cause it appearing to the court that pending an appeal to the Supreme Court by the defendant from a judgment rendered against it at the January Special Term, 1901, of Guilford Superior Court, a similar case for damages against the defendant company, to-wit: B. J. Fisher *vs.* The Greensboro Water Supply Company, has been heard and finally determined by the Supreme Court, by which appeal and opinion of the court all of the questions involved in the appeal in this case have been adjudicated, and defendant, therefore, having withdrawn its appeal from the judgment entered in this case upon the agreement with counsel for the plaintiffs that judgment might be entered herein correcting the judgment of the Superior Court as directed by the opinion of the Supreme Court in the Fisher appeal, it being mutually understood between the parties that the withdrawal of appeal, and the consent to correction of judgment, shall not bind or preclude defendant any further than would have been done by

an appeal and judgment of the Supreme Court directing the corrections as stated in the case of Fisher *vs.* Greensboro Water Supply Co.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiff recover of the defendant, Greensboro Water Supply Company, the sum of three thousand dollars for the tortious injury and damage done her by the negligence of the defendant corporation, with interest thereon from the time of the original judgment, and for the costs of this action to be taxed by the clerk.

THOS. J. SHAW,
Judge Presiding.

Endorsed:

Filed in this office Sept. 27, 1901.

SAM'L L. TROGDON, Clerk.

ANSWER OF THE GUARANTEE TRUST & SAFE DEPOSIT CO. ET AL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(323) WESTERN DISTRICT OF NORTH CAROLINA.
IN EQUITY. No. ——.

The Guardian Trust and Deposit Company et als., Complainant,
vs.
Greensboro Water Supply Company et als., Defendants.

To the Honorable the Judges of said Court:

The answer of the Guarantee Trust and Safe Deposit Company of Philadelphia to the original bill of complaint and to the amended bill of complaint of the Guardian Trust and Deposit Company, complainant in these proceedings, respectfully shows unto your Honors:

That by way of answer to the said bill of complaint and the amendment thereto of the said Guardian Trust and Deposit Company in these proceedings filed, this respondent now, and at all times hereafter, saving to itself all manner of benefit or advantage of exception or objection that can or may be had or taken to any errors, uncertainties or imperfections in said original bill of complaint or amended bill contained, for answer thereto, or to so much thereof as this respondent is advised it is material and necessary for it to make answer to, answering, says:

First. That this respondent admits the first paragraph of the original bill of complaint and of the amended bill of complaint, and also admits the allegations of the paragraphs 2 to 7, inclusive, of the original bill of complaint, with the exception of paragraph 5 B of the said original bill of complaint, which it expressly denies, and it also admits the allegations from 2 to 6, inclusive, of the amended bill of complaint, and denies the allegations from 7 to 9, inclusive, of the said amended bill of complaint, and, further answering, this respondent says that it is a corpor-
(324) ation duly and originally created and organized by and under the laws of the State of Pennsylvania, having its principal office and place of abode in the City of Philadelphia, within said State, and is a citizen of the State of Pennsylvania, and that the other parties to these proceedings against whom the answer and defense of this petitioner and respondent for its interest in the premises is hereby asserted, namely: the Greensboro Water Supply Company, the defendant, and Helen G. Brown, A. M. Scales, assignee of Hodgin, Pegram and Company, A. M. Scales, assignee of A. A. Hinkle, the Southern Stock Mutual Insurance Company, and B. J. Fisher, claimants, are citizens of the State of North Carolina, and the complainant in these proceedings mentioned, the Guardian Trust and Deposit Company, is a corporation duly incorporated under the laws of the State of Maryland, and a citizen of said State, and the subject matter, claim or thing in dispute in this suit, claimed by your said petitioner, or respondent against all of the said other parties above mentioned, is of a value exceeding two thousand dollars ($2,000.00).

Second. And, further answering, this respondent says that, as set out in the third paragraph of said original bill of complaint, the said defendant, the Greensboro Water Supply Company, never received any title to the property in these proceedings mentioned, except subject to the operation and effect of the mortgage in these proceedings mentioned, from the Greensboro Water Company to this respondent, dated January 10th, 1888, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford County, North Carolina, in Book —, No. —, pages No. —, *et seq.*, and known in these proceedings as "Complainants' Exhibit C," and subject to the operation of which mortgage it made its conveyances to said complainant as set out in said bill of complaint; and your respondent further particularly admits and alleges that the statements and admissions of the said bill of complaint

and said amendment thereto, to the effect that the said deed of trust made by the said Greensboro Water Com-
(325) pany to your respondent, was, and is, a first lien upon the property in these proceedings mentioned, and upon the purchase money and proceeds of sale of said property now paid into court, are true, as hereinafter more particularly and fully set out, and this respondent refers to and adopts the findings of the master and auditor of this court, Clement Manly, Esquire, in support of the allegations of this answer.

Third. And, further answering the said bill of complaint, and the said amended bill of complaint, this respondent avers that, by the terms of the mortgage to it by the Greenboro Water Company, a body corporate, dated January 10th, 1888, and hereinbefore described as "Exhibit C," the said property of the Greensboro Water Company, being the property in these proceedings mentioned, and heretofore sold by the order of this court, was conveyed to your respondent in trust to secure the payment according to the terms thereof, of fifty first mortgage bonds, each of the denomination of one thousand dollars ($1,000), and particularly mentioned and described in said mortgage; that said first mortgage bonds of the Greensboro Water Company were duly issued, sold and negotiated by the said Greensboro Water Company for value, about the date of the same, and are now all outstanding having been purchased for value in the hands of the holders thereof, as appears by the testimony heretofore taken by said auditor and master of this court, and by the findings of fact heretofore made and reported by him; that the said bonds are not overdue or in default according to the terms thereof, and that the interest upon the same has been regularly paid according to the terms of the coupons, until the date of the last coupon falling due August 1st, 1901, the money to pay which interest, however, was fully earned by the property operated by the receiver in this cause, as appears from his accounts and report heretofore made to the court in in these proceedings, and now ready to be made and reported, but that the said receiver has withheld payment of the said coupons until the further order and direction of this court; that the said bonds are not, therefore, in default
(326) as to the principal or interest thereof, nor have the holders thereof or your respondent, as their trustee, ever claimed any default or asked or invoked the aid of a court of equity to declare the same, or to execute any remedy for such default under the terms of the deed of trust, but that the holders of a large majority of said bonds, and, in

fact, the holders of all that have been communicated with, have expressed their willingness to receive the principal of said bonds, with interest accrued to date of such payment, and to surrender their said bonds to be cancelled by order of the court in order to enable the said City of Greensboro, the purchaser in these proceedings mentioned, to receive a full and complete title to the property, so as aforesaid ordered to be sold to said City by this court, and the other parties to the cause to obtain an immediate distribution of the said fund in court, subject to the lawful rights and priorities of the said respondent, the trustee for the bondholders under the said deed of trust, to have and receive payment in full of the value of its liens for the principal amount and the interest of the said issue of bonds secured by said deed of trust; that your said respondent specially calls the attention of the court to the fact that, under the the terms of the said bonds and the said deed of trust, the said bondholders are the owners of an investment far exceeding in value the said principal sum and interest accrued to date set out in said bonds, but are entitled of right to hold and enjoy the said bonds and their investment in the same until the full period of maturity of their said bonds, and that their said investment cannot be replaced by the amount of money which they are thus asked to receive, in order to enable the purchaser and the other parties in these proceedings mentioned, to obtain what is asked by them of this court, but that this respondent in behalf of the said bondholders, submits itself to the jurisdiction of this court, and appears in this court in accordance with the summons and order of the court in the premises, with full confidence that this court will accord it, (327) and the bondholders represented by it, full justice and equity, and will determine and adjudge that the said respondent is entitled in behalf of the said bondholders represented by it to a first lien upon the money, the proceeds of the property sold by the court in this cause, the immediate distribution of which is asked by all parties to this cause other than by this respondent, which is assured and pleads and prays that this court will not require it to surrender the bonds of the said bondholders represented by it as trustee, except upon the terms and conditions to which said bondholders have voluntarily agreed, in case the surrender and cancellation of said bonds was deemed essential by the court for the benefit of the other parties who have voluntarily appeared in these proceedings.

Fourth. And this respondent particularly alleges and calls the attention of the court to the facts as set out in the

record, that the claims of all the other parties to these proceeding to the fund now in the hands of the court in this cause, the proceeds of the sale of the property over which this court had, and has ever had, exclusive jurisdiction, are made against this respondent by parties who have appeared voluntarily in these proceedings to assert their claims, right and interest, and have, and are now asserting their right and interest and claim, and who require that this respondent be divested of its first and prior lien which it held upon the property heretofore sold in these proceedings for their benefit, and to enable them to have immediate distribution of said fund in satisfaction of their said claims; that, with the exception of the claim of the said Guardian Trust and Deposit Company, the complainant in these proceedings, which is made altogether subject to the prior right of your respondent to the full extent of its lien to secure the bonds issued under the deed of trust to it hereinbefore mentioned, the said other claimants and parties to these proceedings all claim to deprive your said respondent of its rights in the said premises, which accrued to it upon the execution of the said deed of trust made to (328) it by the said Greensboro Water Company, dated January 10th, 1888, by reason of certain alleged negligent breaches of a contract made *been* the Greensboro Water Supply Company, the defendant in these proceedings mentioned, and the City of Greensboro, to-wit: in the years 1898 and 1899, which with body corporate at the dates of the commission of the said wrongs alleged in said causes of action, your respondent or its assignor, the Greensboro Water Company, never had any relation, contractual or otherwise, or transaction or connections whatsoever, nor can it be affected by the acts, negligencies or defaults of the said Greensboro Water Supply Company to the said City of Greensboro under said contract, or to any person whatsoever, and cannot, by reason of such acts, negligences and defaults of the said defendant, the said Greensboro Water Supply Company, be deprived of its rights in the property aforesaid or the proceeds of sale thereof, held by it in solemn trust, secured by the deed of trust aforementioned.

Fifth. That, further, with the exception of the claims of C. J. Gorrell, in these proceedings mentioned, which was prosecuted to judgment in the Superior Court of Guilford County, North Carolina, prior to the appointment of the receiver in this cause and the assumption of the jurisdiction of this court over the property in these proceedings sold, the said defendants, viz.: all the other parties to these

proceedings, except the complainant in these proceedings mentioned, instituted or prosecuted their said claims to judgment in the Superior Court of Guilford County, without making the receiver of this court a party to their proceedings, and without the leave of this court being had and obtained, notwithstanding the appointment of this receiver in these proceedings by this court, and the assumption by this court of the jurisdiction over the property and primises and the funds, the proceeds thereof, in these proceedings mentioned, for the express purpose of determining all the indebtedness of the said defendant company, the Greensboro Water Supply Company, and the (329) lawful liens and priority of the various classes of creditors, and notwithstanding that this court, according to the prayer of the bill in these proceedings, had expressly enjoined and prohibited all persons whatsoever, from interfering with said receiver as to the possession of the property of said company, etc., or from sueing said receiver in any court of law or under form of any proceeding at law, except upon application to this court, and obtaining permission to take such action, and that such proceedings were adopted by the said other parties to this cause with the express purpose, object and intention of obtaining a different construction, jurisdiction and application of a different rule, of law from that which was known to be the rule and law of this court, to their alleged claims against said defendant company, over whom and over whose property this court had taken complete and final jurisdiction for the purpose of allowing and ascertaining all rightful claims; that not only had this court assumed such jurisdiction over the said defendant company and its property and premises, but that the said jurisdiction was vested, and, under the terms of the bill in this cause, was alleged to be in this court by virtue of the citizenship of the parties, both plaintiff and defendant, and that it is equally and continuously in this court by reason of this citizenship, when the controversy is seen to be between the original complainant in this cause and the said defendant and the original complainant in this cause and all the other defendants and claimants, or between all other parties to this cause seeking to enforce their rights against this respondent.

Sixth. And your respondent particularly avers and charges that the validity of the rights and actions and claims of said several claimants, Helen G. Brown, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram & Company, and the Southern Stock Mu-

tual Insurance Company and of B. J. Fisher, reported by the special master in these proceedings appointed, as filed in this cause against the said Greensboro Water Supply (330) Company, the defendant in these proceedings mentioned, when made and asserted against your said respondent, who was in nowise a party to said proceedings, and who was not even a party to these proceedings until the process of this court was served upon it and returned the 5th day of August, 1901, is solely to be determined by this court, and that such claims are in no respect valid claims against said defendant in these proceedings mentioned, and that it could not be made and never could have been made liable upon such a cause of action as is set out in the records relied upon by said claimants in this court, or under the law and judicature administered by the Federal courts, and that further and particularly upon the examinations of the records of such claims, it will be seen that the causes of action therein set out are not of a nature which can be enforced against the fund in these proceedings, the proceeds of the property sold by the process of this court in these proceedings, at the expense of, or prior to, or in any way to the detriment and diminution of the lien of this respondent, given to it and secured to it under the deed of trust made to it by the Greensboro Water Company, dated January 10th, 1888, viz.: Exhibit C, for the benefit of the holders of said bonds issued under said deed of trust.

Seventh. And your respondent respectfully submits to the court that it will not permit it to be divested of the lien given to it for the benefit of the holders of the bonds mentioned in said deed of trust made to your respondent, except upon equitable terms, such terms being full value and compensation for the right and lien held by your respondent, or a sum which it may be willing to receive as the equivalent of such value or compensation as hereinbefore mentioned, and that this court will, in the exercise of its jurisdiction, which belongs to it exclusively as between the parties claiming said fund, both by reason of the citizenship of the opposite parties and by reason that it had, and has, full and exclusive jurisdiction of the property and of the proceeds of sale in these proceedings mentioned, exam- (331) ine and determine the issues between the said other claimants and your said respondent, under and according to the rules of law and the system of judicature and procedure which is binding upon this court, and will determine that this respondent is in no way liable or responsible, or subject to be deprived of its prior right to the full amount of its said lien in the said fund in the hands of the

court, at the claims of the said claimants next hereinbefore mentioned, by reason of any right, claim or demand whatsoever against the said defendant, the Greensboro Water Supply Company, and especially by reason of the alleged claim or right or cause of action against said company set out in the records of the said claims heretofore filed in these proceedings; and that this court will not order this respondent to be divested of its said lien or claim, or bonds of the said bondholders represented by your respondent to be delivered up and cancelled except upon the payment of the full amount of the principal of said bonds and the interest accrued on each of said bonds, to the date of such payment of said bonds upon the deposit of the same in this court.

And, having fully answered, this respondent humbly prays to be hence dismisse with its reasonable costs and charges in this behalf most wrongfully sustained.

GUARANTEE TRUST & SAFE DEPOSIT CO.,
Trustee, &c.,

By H. J. DELANEY, V.-P. [Seal]

Attest:

JNO. J. GILROY,

BYNUM & BYNUM,
ARCHIBALD H. TAYLOR, Solicitors.

UNITED STATES OF AMERICA, }
District of Pennsylvania. }

H. J. Delaney, being duly sworn, says that he is the vice-president of the Guarantee Trust and Safe Deposit Company of Philadelphia, respondent herein; that he has read the foregoing answer and knows the contents thereof; (332) that the allegations therein contained as far as they relate to its own acts are true, and as far as they relate to the acts of others he believes them to be true; that in regard to all matters and things in the foregoing answer alleged, which are not *with* the personal knowledge of this respondent, the deponent has been fully informed and he believes that the same are true.

H. J. DELANEY.

Sworn to and subscribed before me this 19th day of November, 1901.

[Seal] EDWARD RAMSEY,
Notary Public,
Commission expires Feb'y 26, 1905.

Endorsed:

Filed in this office Nov. 22, 1901.

SAM'L L. TROGDON, Clerk.

EXCEPTIONS TO REPORT OF CLEMENT MANLY, MASTER.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN
(333) DISTRICT OF NORTH CAROLINA.

Guardian Trust and Deposit Company, of Maryland,
vs.
Greensboro Water Supply Company et als.

To the Honorable the Judge of said Court:

The exceptions of the Guarantee Trust and Safe Deposit Company of Philadelphia, the mortgagee of the Greensboro Water Company and of the Guardian Trust and Deposit Company of Maryland, the mortgagee of the Greensboro Water Supply Company, to the findings of facts and conclusions of law, if any, contained in the report of Clement Manly, Esquire, the master of this court, heretofore returned to this court, respectfully state as follows:

These exceptants except to the whole of said report, and to each and every part thereof, whether finding of fact or conclusion of law, from which it may be inferred, concluded or decided by this court that these exceptants have not liens under their mortgages, as above set out, for the full amount of said mortgage bonds issued and outstanding thereunder, respectively, upon the proceeds of the operation and sale of the property operated and sold under the order of court by the receiver of this court, prior to the liens and claims of all other parties, persons and intervenors in these proceedings whatsoever, and particularly prior to the alleged liens or claims of the judgment claimants mentioned in clause or finding X. of said report, viz.: of Helen G. Brown, of A. M. Scales, assignee of A. A. Hinkle, of A. M. Scales, assignee of Hodgin, Pegram & Co., of the Southern Stock Mutual Insurance Company and of B. J. Fisher, for the following reasons:

First. Because the said liens of the said exceptants are lawful and valid liens for the amounts of said bond issues,
(334) respectively, from the date of said mortgages, respectively, and the said exceptants cannot be bound, affected and deprived and diminished of their property and rights by the alleged suits and judgments against said defendant

company in these proceedings mentioned to which these exceptants were not parties.

Second. Because before the liens of these exceptants upon the property or the proceeds of the property in these proceedings mentioned can be displaced or taken away, or diminished to any extent whatever, at the suit or claim of said alleged judgment claimants, or of any persons or parties whatsoever, these exceptants are entitled to have said suits, claims, controversies, counter-claims or conflicting rights and demands between themselves and said alleged judgment claimants, in and to the property and moneys in this cause, tried and determined by this court, which alone has jurisdiction between the parties by reason of their citizenship, and over the property and money, the subject matter of the said controversy.

Third. And because the said alleged judgments claimed by said claimants, even though binding judgments, if duly obtained against the said defendant company, as to its own assets, are of no force and effect against these exceptants so as to bind or conclude these defendants as to the assets or property upon which these defendants have a lien duly and lawfully acquired, prior to the date of said alleged judgment.

Fourth. And, because in trying and deciding the controversies between these exceptants and the said alleged judgment claimants, this court must examine the causes of action upon which said alleged judgments were obtained in said State court as alleged, and determine if the same are valid and lawful causes of action, under the rules and system of laws adopted in this court upon which it could support or enter a judgment for such amount, or any amount against said defendant corporation in this court, and must require said judgment claimants to prove clearly and af-
(335) firmatively their right to have and maintain such judgments or any part thereof in this court; and exceptants particularly aver that the alleged causes of action in said suits of said judgment claimants, were not lawful causes of action, upon which said alleged judgments could have been or could legally be entered or adjudged by this court against said defendant company and that this appears upon inspection of the causes of action set out in the records of said suits, and particularly that this court will not deprive or adjudicate these exceptants out of their rights and liens to said property and moneys under its jurisdiction, who have, aforesaid, a Constitutional right to the judgmeut of this court on the controversy between

them and said alleged judgment claimants, by reason of claims arising upon causes of action, which are not lawful causes of action according to the law as adopted and administered in the United States Courts.

Fifth. And because it appears from examination of the records in said suits in which said alleged judgments of said claimants were entered as alleged that the subject matter of said action, whatever be the forms of action adopted, were certain specified breaches of a certain and particular contract between the said City of Greensboro and the said defendant company in these proceedings mentioned, and were not "torts committed" according to the true and lawful definition of such torts, adopted and held by this court and the United States courts, and hence no judgment upon said causes of action could be given effect in this court and this cause, prior to or in diminution of the liens and rights of the said exceptants under their mortgages aforesaid.

Sixth. And because the said judgment claimants have no judgment against the Greensboro Water Company in these proceedings mentioned, and no right to an execution levied against its property, or against the property and rights of any one claiming through said last named corporation, and therefore have no right under the statute of the State of North Carolina, in these proceedings mentioned, to the enforcement of any lien in diminution of the (336) lien of the first mentioned exceptant, and further, that said alleged judgment claimants never had any right to issue or levy any execution against the property or rights of said second exceptant, or prior to or in diminution of the lien of the said second exceptant, because the interest of the said second exceptant and of the said defendant, the Greensboro Water Supply Company, was never at any time of such a nature that it could be made subject to an execution out of a court of law, but was a mere equity of redemption in the property in these proceedings mentioned, the legal title of which was in the said first exceptant and because long prior to the entry of the said alleged judgments of said claimants in the said Superior Court of Guilford County, North Carolina, the whole of the said property and moneys in these proceedings mentioned had been taken possession of by this court by its own officer, the receiver in these proceedings mentioned, and said property, therefore, never was and never could have been lawfully subject to a writ of execution issued out of said State court, and consequently no lien whatever, at the expense of or prior to the lien of the said

second exceptant, could be accorded under the statute of North Carolina in these proceedings mentioned.

A. H. TAYLOR,
R. R. KING,
BYNUM & BYNUM,
Attorneys for Exceptants.

Endorsed:

Filed in this office Feb'y 14, 1902.

SAM'L L. TROGDON, Clerk.

(Minutes of Court on February 27th, 1902.)

The Guardian Trust and Deposit Company (337) *vs.* Greensboro Water Supply Company. | In Equity. No. 151. February 27th, 1902.

Cause called for hearing. Counsel present in court representing parties interested in the proceedings: A. H. Taylor for plaintiff; John N. Staples and A. L. Brooks for B. J. Fisher; Bynum & Bynum for Guarantee Trust and Safe Deposit Company; Jas T. Morehead for the City of Greensboro; A. M. Scales for Southern Stock Mutual Insurance Company; John N. Wilson and L. M. Scott for H. G. Brown.

This cause coming on to be heard in accordance with adjournment on February 3rd, 1902; argument is begun by A. L. Brooks, Esq., counsel for B. J. Fisher.

Transcript of record in the case of Fisher *vs.* Water Company, from Superior Court of Guilford County, filed in this case by leave of the court.

It is ordered by the court that John N. Staples, Esq., be allowed to take the above named transcript out of the clerk's office during the night for examination.

Test:

SAM'L L. TROGDON, Clerk.

(338) No. 185.

Fisher *v.* Water Company. | From Guilford.

Before TIMBERLAKE, J. Plaintiff appealed.

STATE OF NORTH CAROLINA, Guilford County, | In the Superior Court, August term, 1899.

Be it remembered, that on the 20th day of July, 1899,

B. J. Fisher sued and prosecuted out of the Superior Court of Guilford County a summons in these words, to-wit:

Summons for Relief.

STATE OF NORTH CAROLINA, Guilford County. } In the Superior Court.

B. J. Fisher
against
Greensboro Water Supply Company.

State of North Carolina to the Sheriff of Guilford County, Greeting:

You are hereby commanded to summon Greensboro Water Supply Company, the defendant above named, if it be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Guilford, at the Court House in Greensboro, on the (339) fifth Monday before last Monday in September, it being the 21st day of August, 1899, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint, and the cost of this action to be taxed by the clerk. Herein fail not, and of this summon make due return.

Given under my hand and seal of said court this 20th day July, 1899.

[Seal] JOHN J. NELSON,
Clerk Superior Court of Guilford Co.

We acknowledge ourselves bound unto The Greensboro Water Supply Company, the defendant in this action, in the sum of $200, to be void, however, if the plaintiff, B. J. Fisher, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hand and seal this 20th day of July, A. D., 1899.

B. J. FISHER, [Seal]
J. F. JORDAN, [Seal]

Returnable to August term, 1899, of the Superior Court of Guilford County.

Received July 20, 1899; served July 20, 1899, by de-

livering to and leaving with Jas. D. Glenn, President of the Greensboro Water Supply Company.

J. H. GILMER,
Sheriff Guilford County.

Complaint.

NORTH CAROLINA, } In the Superior Court,
(340) Guilford County, } August term, 1899.

B. S. Fisher
against
Greensboro Water Supply Company.

The plaintiff complains of the defendant, and alleges:

I. That the defendant company is a corporation duly organized under the laws of the State of North Carolina, and as such is engaged in supplying water to the City of Greensboro and its inhabitants for the purposes of domestic use, and also for use in case of fire, and as such are the owners and possessed of all the rights, privileges, powers and franchises necessary and incident to the operation and conduct of the business in which it is engaged.

II. That by virtue of a deed executed to the defendant company by Hugh L. Pope, on the 31st day of May, 1896, as will appear by reference to Book 104, page 656, etc., in the office of the Register of Deeds of the county of Guilford (to which reference is made, and so much thereof as is applicable to this case is hereby prayed to be taken as a part of this complaint), the said defendant company became the purchasers, and possessed of all the rights, titles and interests (in law or in equity), powers, franchises, earnings and revenues theretofore owned or acquired by the Greensboro Water Company, or exercised and acquired by James D. Glenn, receiver, in a certain suit in the United States Circuit Court, at Greensboro, wherein one Middendorf and others were the plaintiffs and the Greensboro Water Company was the defendant, including all the property, real, personal and mixed, and all the rights and interest in law and in equity, privileges, powers,
(341) franchises, earnings and revenues belonging to, or acquired by the said Greensboro Water Company, or exercised and acquired by the said James D. Glenn, receiver, as aforesaid, under and by virtue of the laws and acts of the Assembly of the State of North Carolina, and under and by virtue of the acts, concessions and permissions of the corporation of the City of Greensboro, or its Board of Aldermen or other other officers or representatives, either

of the city or of the county of Guilford, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, or the decrees of the said court, together with all the real estate, personalty, rights-of-way, or other easements or property of any sort or description whatsoever, in the State of North Carolina, or wheresoever situated, of the said Greensboro Water Company, or the said receiver, including particularly all the water works, dams, reservoirs, tanks, pumps, basins, pipes, mains, hydrants, fire plugs, owned or acquired by the said Greensboro Water Company or the said receiver, and all the machinery, engines, tools, implements and materials for constructing, operating or repairing said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money and income arising, or to arise, from the operation of the said water works under the franchises granted or belonging to the said Greensboro Water Company.

III. That under the contract entered into between the City of Greensboro, a municipal corporation, acting in accordance with law, and by virtue of its charter, a contract or ordinance was made in pursuance thereof, and in accordance with law, whereby W. W. Taylor and others were authorized to construct and maintain and operate water works and supply the City of Greensboro and its inhabitants with water, etc. That under said contract the (342) said Taylor and others were empowered to build, construct, maintain, own and operate water works in the City of Greensboro, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use; to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of the city, then existing or thereafter to be laid out or opened up, for the purpose of conducting and distributing water throughout said city; to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pumphouses and other appliances and attachments necessary for the proper constructing and carrying on of said water works, etc., so as to secure the most adequate supply of water for all domestic use, and the greatest protection against fire, for the term of twenty (20) years from the date thereof, to-wit: the — day of ———, 1887.

(2) It was further contracted and agreed that the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works should be ample and sufficient for the purposes mentioned in the

said contract. That it was further agreed that said water works, to-wit, its pump-house or other suitable house in connection therewith, should at all times be occupied by an engineer, or some suitable and intelligent employee, who should at all hours be accessible to the call of the city for water; and in order to facilitate a sufficient supply of water in case of urgency or peril, it was further agreed that the said pump-house, or other suitable house, should be connected with tho fire department of the city, or other place designated by the city, by a telephone, electrical apparatus, or any like suitable appliance, by which alarms, calls and communications might be had at all hours with the engineer or employe at said pumping-house or dwell-
(343) ing, as aforesaid, so as to make communication of threatened danger or want of water at all times as speedy and as sure as possible. And that the said Taylor and others should keep a suitable, intelligent and efficient employe always at a place where he could be accessible to the alarms, calls and communications above named, and whose duty it was to respond promptly to such alarms, calls and communications.

(3) That the engines and machinery should be adequate and adapted to the requirements of said contract, and the machinery and appurtenances should be sufficient to give a capacity of one and one-half millions (1,500,000) gallons of water in twenty-four (24) hours against a pressure of two hundred (200) feet head.

(4) That the storage water tank, from which the supply of water comes immediately should be, at its top water level, one hundred (100) feet above the surface of the ground at the center of the public square near the courthouse, and should be of a capacity to hold at least one hundred thousand (100,000) gallons of water, and should be filled to its top every day, an hour before sun down.

(5) That for the extinguishment of fires pumping engines should be kept ready at all times to supply the needed fire pressure.

(6) That the City of Greensboro should pay for the seventy-five (75) hydrants named in the said contract the sum of two thousand, eight hundred and seventy-five dollars ($2,875), payable semi-annually on the 1st day of July and on the 1st day of January of each year, the first payment of the fraction to be payable the 1st day of July, 1888.

IV. That the said W. W. Taylor and others, on the

29th day of December, 1887, were incorporated under the
(344) general laws of North Carolina by the name and style of the Greensboro Water Company, whereby they were empowered to build and construct water works and to own and operate the same for the purpose of supplying the City of Greensboro and the inhabitants thereof with pure and wholesome water for domestic and sanitary purposes, for manufacturing and for protection against fire; which articles of incorporation are recorded in the office of the Clerk of the Superior Court of the County of Guilford in "Record of Incorporations," pages 38 and 39, to which reference is hereby made; which said articles of incorporation, filed as aforesaid, together with all the privileges and powers therein granted, was ratified by the General Assembly of North Carolina on the 3d day of March, 1891, as will appear by reference to chapter 166 Private Laws of North Carolina, pages 1009 and 1010, which said act likewise conferred upon the company power to borrow money and to secure same by mortgage.

V. That the contract, as aforesaid, made with the said W. W. Taylor and others, was assigned and transferred to and assumed by the said Greensboro Water Company, which said company acquired all the rights, privileges and powers therein granted and conferred to the said Taylor and others, and undertook to carry out the provisions thereof by constructing water works, pump-houses, engines, or tanks, towers, mains, pipes, hydrants, etc., for the purpose of supplying the inhabitants of the City of Greensboro with water under the said contract, and likewise for the purpose of supplying a sufficient quantity of water for the extinguishment of fire That under the said contract the said water works company collected under said contract from the City of Greensboro an annual rental [of] two thousand, eight hundred and seventy-five dollars
(345) ($2,875) up to and until the 4th day of June, 1892, when the said company went into the hands of a receiver, by virtue of a decree of the Circuit Court of the United States in the said case of Middendorf and others against the Greensboro Water Company, which said two thousand, eight hundred and seventy-five dollars ($2,875) was, by an agreement made with the said water company, paid to Baltimore Trust and Guarantee Company, of the City of Baltimore, to be applied to the payment of interest on mortgage bonds issued by the said Greensboro Water Company. Said amount was paid by the said City of Greensboro, on account of the said water company, up to the time of the appointment of said Glenn as receiver, and thereafter an-

nually paid to him during the operation of the works by him as said receiver, the same being raised by taxation for the necessary and incidental expenses of the city, laid upon the inhabitants thereof, and collected as other taxes are collected, for the use of the government of said city.

VI. That the plaintiff in this action is an inhabitant and a taxpayer, both upon real and personal property, in the City of Greensboro, and was assessed his proportionate part of taxes according to the property owned by him, and he paid the same to the City of Greensboro as a part of the said two thousand, eight hundred and seventy-five dollars ($2,875), as a rental for the water to be furnished by the said water company to the said City of Greensboro and its inhabitants under the said contract.

VII. That, by virtue of his said appointment as receiver, the said James D. Glenn undertook to carry out the contracts and agreements of the said Greensboro Water Company, among which was the above mentioned contract of Taylor and others with the said city, which had been assumed by the Greensboro Water Company, and, during (346) the time he was receiver, additional mains and pipes were laid, and hydrants constructed, and other improvements put upon the works, for which an additional amount was paid by the City of Greensboro to the said receiver under the terms of the said contract.

VIII. That, by virtue of a decree of the Circuit Court of the United States in the said suit of Middendorf et al., the property of the Greensboro Water Company was sold as aforesaid by Commissioners Archibald H. Taylor and Robert R. King, on the 30th day of April, 1896, at which sale the said Hugh L. Pope became the purchaser, to whom was conveyed all the rights, titles, privileges, franchises, property, real, mixed and personal, including all the contracts assumed by the said Greensboro Water Company, and the said Glenn, receiver, including all tanks, dams, reservoirs, pumps, basins, pipes, mains, hydrants and fire plugs owned or acquired by the said Greensboro Water Company or the said receiver, and all the machinery, engines, tools, implements and materials for constructing, operating and repairing said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money and income arising, or to arise, in the operation of the said water works under the franchise granted or belonging to the said Greensboro Water Company, which said deed of conveyance is referred to and made a part of the deed made by the said Pope to the defendant in this

action, the Greensboro Water Supply Company, to which reference is hereby made, the same being recorded on page 652, Book 104, Register's office of the County of Guilford.

IX. That the said defendant company, by virtue of the said deed of conveyance, as aforesaid, took possession of the said property of the Greensboro Water Company, then in the hands of the said receiver, and all other property and effects belonging to it, and has been, from the time of (347) said purchase and up to and including the time hereinafter mentioned, so conducting, managing and operating said water works, and have been laying pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of the city, and have been distributing water throughout said city, and have been receiving rentals and incomes from the said City of Greensboro, and the inhabitants thereof, for the use of the water supplied by it, and have assumed all the obligations and duties imposed upon it, and have enjoyed all the privileges and benefits derived from the said contract, hereinbefore referred to, a copy of which contract, made with the said Taylor and others, as aforesaid, which contract is hereto attached, marked Exhibit "A," and so far as is applicable is hereby made a part of this complaint.

X. That when the said defendant company took possession of the said water works, it took it with the agreement and understanding between it and the said City of Greensboro, that it would keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred (100) feet of hose and a one-inch ring and nozzle, and that they would constantly, day and night, keep all the said hydrants in good order and supplied with water for fire purposes.

XI. That on the morning of the 17th day of June, 1899, about the hour of noon, the Benbow house, a four-story hotel, situate on the corner of South Elm and Sycamore streets, in the City of Greensboro, accidentally and without any fault on the part of the plaintiff, the owner and proprietor of said hotel, caught on fire at the southwest corner of the building on Sycamore street, just over the building known as the kitchen, near or in the mansard (348) roof of the building. That immediately after the fire was discovered an alarm was sounded, and in the space of a short time, or as soon thereafter as it was practicable, the fire department of the City of Greensboro responded to

said alarm, and immediately came to the said Benbow hotel, having with them their hose, their engine, aerial ladders and all other necessary appurtenances for the immediate and ready extinguishment of the fire. That upon arriving at the scene of the fire, within ten (10) minutes after the alarm had been sounded, the hose had been attached to the hydrants of the defendant company in and about and near the said hotel, and the water turned on. The seat of the fire being the immediate objective point of the fire company, a stream of water was undertaken to be thrown from an aerial ladder, which had been raised immediately under the fire on Sycamore street, when the water pressure was not sufficient to throw a stream higher than between the second and third-story windows, a distance not exceeding thirty (30) feet, falling short of the fire some twenty (20) feet or more. That almost immediately thereafter the aerial ladder was raised to the top of the roof above the kitchen and on the building, and the water pressure was not sufficient to throw a stream of water with any force whatever from the nozzle, but the water simply oozed from the nozzle, without any force whatever.

XII. That immediately after the fire began, when it was almost in an insignificant state, the employes of the hotel undertook to use the hotel hose, which was connected with the water main within the building, but owing to the lack of pressure of water, the said hotel employes and others attempting to extinguish the fire could not reach the fire with the water, notwithstanding the nozzle of the hose was within eight (8) or ten (10) feet from the seat of the fire.

(349) XIII. That at any time within thirty (30) minutes after the fire had been discovered, if there had been sufficient pressure of water to play upon the building and fire, either by the company hose, which was attached to the hydrant on the outside of the hotel, or from the hotel hose in the hotel, the fire could have been speedily and easily extinguished with but very little damage to the property and building. That for more than one hour after the fire had begun, and not before it had gained such headway as to consume a greater portion of the building, and do great damage, was the pressure of water sufficiently strong to throw a stream as high as thirty (30) feet, falling short of the seat of the fire in almost every attempt to reach it; and even after the hose was carried to the roof of the house by the firemen and an attempt was made to use the water from the top of the building, the pressure was not sufficient to give any effective force to the water, whereby the fire

could be even retarded, much less subsided. That a number of hose were attempted to be used on the east side of the hotel on South Elm street, as well as on Sycamore street, but not until after the fire had gained such headway as to have produced great damage and destruction of the property was there a sufficient pressure of water supplied by the defendant company to reach the fire, or to be of any practical benefit in its extinguishment.

XIV. That the fire department of the City of Greensboro was in every respect fully equipped, capable and efficent to cope with the said fire, and if supplied with a sufficient pressure of water, whereby a stream of water could have reached the fire, which was less than a vertical height of one hundred (100) feet in still air, it could, with little difficulty, have extinguished the same; in fact, had the water pressure been sufficient to have forced the water out of the hose attached inside of the hotel, known as the hotel hose, the fire could have been extinguished within from (350) three (3) to ten (10) minutes after it had been discovered.

XV. The plaintiff alleges that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the City of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the City of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city, and derived by said city from taxation on the inhabitants thereof, and particularly on the plaintiff, a property owner, as aforesaid, and a tax-payer in the said City of Greensboro, and by reason of the said wilful, tortious, culpable, reckless and gross negligence of the said defendant company, and by reason of its failure and omission to perform its contractual, as well as its public obligations and duties to the said City of Greensboro and its inhabitants, and especially toward the plaintiff in this action, in that it wholly failed and carelessly and negligently refused to furnish the said hydrants in and about the said hotel, as hereinbefore set forth, with a sufficient pressure of water to extinguish the said fire before the same had greatly damaged and effectually destroyed and injured a greater part of the said building, and by reason of such tortious, negligent and careless conduct on the part of the said defendant company the plaintiff was damaged in the sum of forty thousand dollars ($40,000.00).

XVI. The plaintiff is advised, and so alleges, that the

defendant company negligently failed to perform its obligations to the said City of Greensboro and its inhabitants and tax-payers, and especially toward the plaintiff in this action, by carelessly, wilfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said City of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied.

XVII. The plaintiff alleges that the defendant company negligently and carelessly failed to keep its pumping engine ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned.

XVIII. That there was sufficient hydrants in and near said hotel property to amply furnish a sufficient quantity of water to have extinguished the said fire if there had been a sufficient pressure upon the same, whereby the water could have been utilized by the fire department, but by reason of the lack of pressure the said fire department, as hereinbefore stated, was wholly unable to arrest the flames in their ravages of the building and property of the plaintiff, but stood helpless and impotent to extinguish the said fire and save the said property of the plaintiff from the great damage and destruction which thereby ensued.

XIX. That the omissions and failure of the said defendant company to perform its duty and obligations, as hereinbefore set out, and its gross negligence in failing to supply a sufficient water pressure to meet the exigencies and necessities of the occasion, which was its bounded duty to do, both under the contract as hereinbefore stated, as well as the benefits derived and enjoyed by it by the license and privileges granted to it by the said City of Greensboro and its inhabitants, the property of the plaintiff was almost wholly destroyed, greatly to his damage, in the sum of (352) forty thousand dollars ($40,000.00).

XX. That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor.

Wherefore the plaintiff demands judgment against the defendant, The Greensboro Water Supply Company for the sum of forty thousand dollars, damages and the costs of this action, and for such other and further relief as in law or equity he may be entitled.

JOHN N. STAPLES,
A. L. BROOKS,
Attorneys for Plaintiff.

B. J. Fisher, plaintib in the above entitled action, being duly sworn, maketh oath that the facts stated in the foregoing complaint are true of his own knowledge, except such matters and things as are therein stated on information and belief, and as to those matters he believes it to be true.

B. J. FISHER.

Subscribed and sworn to before me this 14th day of September, 1899.

JOHN J. NELSON,
Clerk Superior Court.

Exhibit "A."—Contract for City Water Works.

(353) An ordinance authorizing W. W. Taylor, of Philadelphia, Charles H. Hinchman, of Philadelphia, and Fred B. Hubbell, of Baltimore, to construct and maintain and operate water works to supply the City of Greensboro, North Carolina, and its inhabitants with water, and defining their rights, duties, privileges and powers.

Section 1. That the said Charles S. Hinchman, W. W. Taylor and Fred B. Hubbell be, and they are hereby, empowered to build, construct, maintain, own and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use, to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of said city, subject to the conditions hereinafter named, to use within the present and future limits of said city any and all streets, avenues, alleys and bridges, and such other public grounds as are now or be hereafter laid out while constructing or repairing such water works, to receive, take, store and purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses and other appliances and attachments necessary or expedient for the

proper conducting and carrying on said water works, to cross any street in said city, in laying or extending their pipes, conduits or acqueducts as may be necessary and proper for the distribution of water throughout said city, so as to afford the most adequate supply for all domestic uses and the greatest protection against fire.

(354) Provided, however, that the said grantees aforesaid shall not permanently use any street, avenue, alley, bridge or public grounds above named or occupy the same for any longer time than necessary for the purpose hereinafter indicated, without the permission of the Board of Commissioners, first obtained.

Nor shall the aforesaid grantees permanently injure any street, avenue, alley, bridge or other public grounds above named, but shall restore them to the like condition as it found said streets, avenues, alleys, bridges and public grounds aforesaid, saving the necessary and proper underground work. Provided also that the supply of water hereinbefore named shall continue sufficient for all domestic, sanitary and fire purpose and individual use.

Said grantees are to have the exclusive right to construct, maintain and operate said water works as hereinafter specified, and on the conditions, terms and liabilities set out in this ordinance for the term of twenty years from the date of the completion and acceptance of said water works, and unless such rights shall sooner be terminated as hereinafter provided by purchase or forfeiture, all such rights and liabilities shall continue for another like period of twenty years, unless said additional term of twenty years be also ended as above provided by purchase or forfeitures.

Sec. 2. The plant of the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works shall be amply sufficient to supply water for the purposes hereinafter mentioned to at least twenty thousand people and to be enlarged and extended to supply a greater actual population, if so required by the Board of Commissioners of the city for the necessities of its inhabitants.

Sec. 3. In case there shall be any disagreement or contro-
(355) versies between the City of Greensboro and the grantees aforesaid in regard to the supply of water or the quality of and quantity thereof or the manner of supplying the same, either party shall have a right to demand in writing of the other, that such matter of dispute, disagreement or controversy be submitted to arbitration, one arbitrator to be chosen by each party, who are to be non-residents of the

City of Greensboro and impartial and disinterested persons, and if they disagree they shall have power to call in an umpire, and the award of the two arbitrators, or one arbitrator and the umpire, filed in writing with the parties and signed by them, shall be final and binding upon both parties, and either party shall have the right to have the same specifically performed in a court of equity or other appropriate judicial tribunal and a failure to perform such award in a reasonable time by the aforesaid grantees shall work a forfeiture of its rights under the ordinance.

Provided that if the dispute or controversy be in regard to the quality of water, the arbitrators and umpire shall be chemists of good reputation.

Sec. 4. The machinery, pipes, hydrants, valves, pumping plant and all other like appurtenances and fixtures used in the water works and in supplying the water are to be first-class in their material and the manufacture thereof.

The grantees aforesaid guarantee and stipulate that the water supplied shall be pure and wholesome, and that the supply shall be, and continue adequate to the demand for the same by the city or its inhabitants.

Sec. 5. During the progress of the work the grantees aforesaid, shall not unnecessarily obstruct any street, avenue, alley, bridge or public ground in laying its pipes or conduits. They will properly repair and make good any gas or sewer pipes, previously laid, which shall be disturbed, (356) misplaced, or injured by it, and complete each part of work commenced as speedily as possible and restore all the ground disturbed, to as good condition as it was before the work began, and that in the erection, construction and repair of said work in any street, avenue, alley, bridge or other public grounds aforesaid, and removing pavements, curbstones or side walks or other public grounds, and making all necessary excavations for repairs, the grantees aforesaid shall suitably guard and protect the same by enclosures, lamps, watchmen or by the use of any other precaution necessary to prevent injury to persons and property by reason thereof, and said grantees aforesaid shall be liable for all damages for failure to so guard and protect persons and property from injury, when occasioned by its negligence and shall save the city harmless therefrom.

Sec. 6. The water works shall be complete in all its details. The pump house erected shall be of brick, covered with metal and of substantial and neat architecture and, as far as possible, protected from fire. There shall also be in connection with said pump house, near by or as a part

thereof, an engineer's dwelling house to be occupied by the engineer or some suitable, intelligent and efficient employee of the grantees who shall, at all hours, be accessible to the call from the city for water.

That these houses, or such one as may be suitable and necessary, may be connected at the expense of the city with the fire department of the city, or other places designated by the city, by telephone, electrical apparatus or any like suitable appliances, by which alarms, calls and communications may be had at all hours with the engineer or employees at said pump houses or dwelling houses aforesaid, and so as to make the communication of threatened danger or want of water or other demand as speedy and as sure as possible.

And the grantees are to keep a suitable, intelligent and efficient employee always at a post where he shall be accessible to the alarms, calls and communications, above nam-
(357) ed, and shall respond promptly to such alarms, calls and communications.

Sec. 7. The engines and machinery shall be in duplicate and in the beginning fully adequate and adapted to the ultimate requirements and stipulations of this ordinance and contract.

The machinery and appurtenances shall be sufficient to give a capacity of one and one-half millions of gallons (1,500,000) in twenty-four hours against a pressure of two hundred (200) feet head.

The storage water tank from which the supply of water comes immediately shall be at its top water level one hundred feet (100) above the surface of the ground at the center of the public square near the court house and shall be large enough to hold at least one hundred thousand (100,000) gallons of water, and it shall be filled by the grantees aforesaid to its top every day an hour before sun down.

Sec. 8. For the extinguishment of fires the pumping engine shall be kept ready at all times to supply the needed fire pressure.

Sec. 9. The grantees aforesaid shall submit their water works, when finished, to the following as a test of its capacity and efficiency: They agree that the works shall throw six (6) streams of water from six (6) hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred feet (100) of hose and a one-inch ring and nozzle.

Sec. 10. All the water mains and pipes used by the grantees aforesaid shall be of the best quality, coated in-

side and outside with Dr. Angus Smith's patent coal tar varnish, and shall be tested at their place of manufacture to withstand a hydrostatic pressure of three hundred pounds to the square inch.

(358) The distribution of pipes and the location of hydrants shall be as indicated in a map to be furnished by the city and subject to be changed at any time by the city at its own expense. The pipes shall be laid and properly embedded in the ground of sufficient depth to prevent freezing. Not in any case to be less than two (2) feet from the surface.

The grantees aforesaid agree to extend the pipes whenever required so to do by the Board of Commissioners on condition that there shall be placed on said extension of piping twelve hydrants to the mile, for the rental of which the city will pay thirty-five dollars ($35.00) each, and which price shall be the rental of all hydrants over seventy-five.

Sec. 11. The grantees aforesaid agree to furnish a "better hydrant than the Matthews double opening fire hydrant" and to use the Eddy valve.

If the hydrant put in by the grantees shall be unsatisfactory in its operations to the city of Greensboro, it may require the grantees aforesaid to submit the matter to arbitrators as hereinbefore provided, and the grantees agree, if the arbitrators so award, to change the hydrants to the one designated by the arbitrators.

All the hydrants shall be made to fit on any particular hose coupling which shall be indicated in writing, by the City of Greensboro. The indication in writing to be furnished in twenty days from the execution of this contract.

Sec. 12. The city agrees to use the hydrants for the extinguishment of fire only, subject to exceptions hereinafter named, to-wit:

(1) The grantees aforesaid agree to furnish water to the city from the hydrants for street sprinkling, flushing gutters and sewers, fire drill and all other public city uses and purposes (not specified in the schedule of prices and free supplies) at the rate of two-fifths of a cent per barrel or ten (10) cents per one thousand (1,000) gallons.

(359) The grantees aforesaid agree that they will furnish the following supplies free of charge, to-wit:

(1) One telegraph faucet in each of the two public schools.

(2) One fountain in the central portion of the city for the personal use of passers-by, horses from the country and those in draft use, but not to be used by horses led indis-

criminately from stables in the city to be watered at this fountain. Nor is water to be carried from the fountain for the use of citizens or others, nor for stock except as above provided.

Sec. 13. The size of the piping shall be as follows, to-wit:

From the pumping station to the south end of South Elm st.,	10 inches.
From this ten-inch pipe on South Elm street to the storage tank,	12 inches.
Along West Market from Elm to Edgeworth street,	8 inches.
Edgeworth street to Cedar street,	6 inches.
Cedar street to College,	6 inches
Elm street to Forbis street,	8 inches.
Forbis street to Gilmer street,	4 inches.
On Cedar street,	4 inches.
On Spring street,	4 inches.
On Edgeworth street,	6 inches.
On Eugene street,	4 inches.
On Ashe street,	4 inches.
On Green street,	4 inches.
On Davie street from Market to N. C. R. R.,	6 inches.
On Davie South of N. C. R. R.,	4 inches.
On Forbis street,	4 inches.
On Percy street,	4 inches.
On Gaston street,	4 inches.
On Sycamore street,	4 inches.
On East Washington street to Forbis street,	6 inches.
On West Washington street,	4 inches.
On New street,	4 inches.
On Asheboro street,	8 inches.
On Depot street,	6 inches.
On Church street,	6 inches.
On Lindsay street,	4 inches.

It is the further agreement and understanding of the parties of this contract that if at any time hereafter it shall appear to the city that the foregoing sizes of piping are inadequate to the supplies needed in those localities that the (360) City of Greensboro shall have the right to indicate its opinion in writing to the grantees aforesaid and request an arbitration to settle the matter. It shall then be the duty of said city and the grantees aforesaid to appoint arbitrators as hereinbefore provided, and if they award that the piping shall be increased, it shall be the duty of the grantees aforesaid to change the piping according to the award, and to begin such work within twenty (20) days after the award in writing is furnished to said grantees.

Sec. 14. The grantees aforesaid shall furnish supplies of water to the Greensboro Female College and Bennett Seminary, if desired by them, at the same rates and prices and on the same conditions, terms and regulations as it furnishes supplies to the City of Greensboro and its inhabitants.

Sec. 15. If the hydrants get out of order it shall be the duty of the grantees aforesaid to use all due diligence to repair the same and shall forfeit two dollars ($2.00) per day to the City of Greensboro for every day that it fails to perform said duty.

Sec. 16. The grantees aforesaid shall have the right to make all reasonable and just rules and regulations governing the service of water to private consumers as may be necessary for their protection in that behalf and may enforce the observance of the same by cutting off the supply of water or otherwise, and shall have the right at all reasonable hours of the day to have access to the water pipes and metres of any taker; to protect itself from abuse and fraud, or repair or observe or remove the same, and may require all water takers to sign a contract embracing these rules and regulations.

The City of Greensboro shall protect the works and property of the grantees aforesaid in said city by suitable ordinances.

(361) Sec. 17. The grantees aforesaid shall furnish the City of Greensboro a description and draft of its machinery, appurtenances, fixtures, location and size of piping, hydrants, storage tank, pump houses and other houses and other like information desired by the city to give the Board of Commissioners an intelligent and comprehensive idea of the extent, kind and condition of its whole water works and its connections.

Sec. 18. The grantees aforesaid shall put in gate valves in sufficient numbers to divert and control the water and have as few "dead ends" as possible.

Sec. 19. The said grantees aforesaid shall constantly, day and night, except from unavoidable accident, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said services, and shall maintain a head of at least seventy (70) feet in the stand pipe or storage tower, except in case of unavoidable accident or when the water is drawn off to cleanse the tank.

Sec. 20. The grantees aforesaid shall furnish water

supplies to the city and its inhabitants at the following maximum prices, to-wit:

Tariff of charges per annum, payable semi-annually in advance:

Banks, churches, stores, offices, &c.,	$ 5 00
Bakeries (not less than ($10.00) daily average one barrel flour each,	4 00
Barbers, each chair,	3 00
Baths, private (hot water) each $1.00 extra,	3 00
Baths, public, each includes hotels and boarding houses,	10 00
Smith shops, per fire,	2 50
Building, brick per M., 10 cents, stone, per yard 5 cents; plastering per square porch, ½ cent,	
Hotel, per room,	1 20
Boarding house, room rates (no charge less than $10.00), extra for each boarder, 50 cents,	
Laundries and washer-women,	$8 00 to 20 00
Printing offices—weekly—6 hands or less (each additional hand, 50 cents),	8 00
(362) Photograph gallery,	$10 00 to 15 00
Residence, for general domestic use—4 rooms or less,	5 00
Residence, for general domestic use—6 rooms or less,	6 00
Residence, for general domestice use—8 rooms or less,	00
Residence, for general domestic use—10 rooms or less,	9 00
Residence, for general domestic use—12 rooms or less,	10 00
Residence, for general domestic use—more than 12 rooms,	11 00
Restaurants,	$8 00 to 15 00
Private stables—horse and carriage, each	1 50
Public stables—horse and carriage, each	2 00
Steam boiler, per horse power, up to 15, special,	
Saloons, beer, &c.,	10 00
Pavement washer, including street sprinkler ½ width of street, per each 25 feet front (each add. 25 feet or fraction 2.00),	3 00
Irrigation—lawns, gardens, &c., per 1,000 sq. ft. or fraction, meter measurement (no charge less than $10.00, per 1,000 gallons, 25 cents; factories, fountains, schools, &c., special rates.	

Any consumer shall have the right to put in a meter and pay for the water at the meter rates. The grantees aforesaid shall also have the privilege of putting in a water meter and charging for the water at meter rates.

The water rents charged by said grantees to consumers for domestic and manufacturing purposes shall not exceed the average rates charged in other towns in this State supplied by a like system. The connection between the main and the consumer shall be at the expense of the consumer and the lowest annual rate for any one consumer shall be five dollars, ($5.00).

Sec. 21. The grantees aforesaid shall begin active operations in good faith on the water works in thirty days from the time this ordinance is passed and accepted by the grantees aforesaid, and the grantees aforesaid shall have the said works completely finished by the 30th day of April, 1888, ready for tests hereinbefore provided for and for the (363) acceptance of the City of Greensboro.

Sec. 22. The grantees aforesaid shall not employ convict labor on tne works, and shall, as far as practicable, employ labor from this vicinity.

Sec. 23. The City of Greensboro shall pay for the rental of the seventy-five hydrants, hereinbefore provided for, the sum of two thousand, eight hundred and seventy-five dollars ($2,875.00), payable semi-annually, the first day of July and tht 1st day of January, of each year. The first payment of the fraction to be payable the 1st day of July, 1888.

Sec. 24. At the expiration of ten years from the passage of this ordinance, and at each recurring ten years thereafter, the City of Greeensboro shall have the right to purchase the said water works of said grantees at such price or on such terms as may be agreed upon; but in case the parties cannot agree as to price and terms, the city may give three months notice to the grantees aforesaid of its desire to purchase said water works, and it shall then be the duty of each party to appoint a disinterested arbitrator, not a resident of Greensboro, and these two, if they disagree as to the price and terms of the purchase, shall call in an umpire chosen by them and the award of a majority of the three, or of the two arbitrators, shall be final and binding on the parties, and if the grantees aforesaid refuse to abide by the award, they shall forfeit all their rights under this ordinance as a contract.

The award of the arbitrators shall be in writing, and

furnished to each of the parties. The city shall have the option, within ten days after the award is made, to accept or reject the purchase at the price and on the terms awarded by the arbitrators.

If the city declines to purchase, it shall pay the expense of the arbitrators, otherwise to be divided between the parties.

Sec. 25. The city shall be responsible to the grantees aforesaid for any injury negligently done to the hydrants (364) by any of its employees.

Sec. 26. Whenever the words "Grantees aforesaid" are used, they stand for the parties to whom this franchise is granted.

The above contract is certified to as follows:

STATE OF NORTH CAROLINA,
Guilford County.

I, J. D. White, Clerk of the City of Greensboro, in said county and State, hereby certify that the foregoing is a true copy of an ordinance adopted by said City of Greensboro, granting a franchise to W. W. Taylor, Chas. S. Hinchman and Fred. B. Hubbell, to erect water works in Greensboro, N. C.

(Signed) J. D. WHITE,
Clerk of the Board of City Commissioners.

STATE OF NORTH CAROLINA,
Guilford County,
City of Greensboro.

I hereby certify that J. D. White, whose genuine signature is signed to the foregoing certificate, is and was the Clerk to the Board of Commissioners of the City of Greensboro aforesaid at the time of so signing his name, and that his certificate is in due form and entitled to full faith and credit.

In testimony whereof, thereunto set my hand as Mayor, and affixed the seal of my office, at office in Greensboro, on this the 30th day of January, 1888.

(Signed) R. R. KING,
Mayor of Greensboro.

Defendant's First Answer.

NORTH CAROLINA, (365) Guilford County. } In the Superior Court, August term, 1899.

B. J. Fisher
against
Greensboro Water Supply Company.

The defendant, for answer to the allegations made in the several articles of the complaint in the above entitled action, says:

1. That it is true that it is engaged in supplying water to the City of Greensboro and its inhabitants for purposes of domestic use and also for use in cases of fire under certain conditions and limitations, and when and after certain things have been done in some cases, and in others agreed to be done and performed on the part of such person or persons who may want water under certain terms and for certain purposes, and shall have legally contracted therefor, and its powers, privileges and franchises are such as are granted and given by its charter, and no other.

2. That as to the allegations made in the second article of the complaint, this defendant has no knowledge nor information sufficient to form a belief other than it purchased certain rights, franchises, privileges, etc., from and under a deed from Hugh L. Pope, recorded as said article alleges; but as to what this defendant got thereby, the said deed does and will show, and same is made a part of the complaint for reference.

3. That as to the several allegations made in the third article of the complaint, this defendant has no knowledge nor information sufficient to form a belief, except that it is advised and avers the fact to be that the City of Greensboro, in said article mentioned, has never en-
(366) tered into any contract or ordinance, in accordance with law and by virtue of its charter with W. W. Taylor and others, nor with any other person or persons, and any effort or attempt on the part of the said city to contract, if any was made, with W. W. Taylor and others, or any other person or persons, was not made in pursuance of any power given it by any law legally passed by the General Assembly of North Carolina; and further, that the said city had no power to make such contract without authority expressly given by an Act of the General Assembly of North Carolina, read on three separate days in each branch of the said General Assembly, and the ayes and nays called and entered upon the records of both branches on the sec-

ond and third readings, which was never done; and for lack of such authority no contract, made or attempted to be made, was of any legal validity, and this lack of validity this defendant hereby pleads and sets up and relies upon as a defense to any recovery in this action.

4. That as to the several allegations made in the fourth article of the complaint, this defendant has no knowledge nor information sufficient to form a belief, except as to the existence of the records therein mentioned, to-wit, that in "Record of Incorporation," pages 38 and 39 of the Act of the General Assembly of 1891, and the contents of said records, which speak for themselves, and all allegations as to the contents thereof not shown forth by said records are denied.

5. That as to the several allegations made in the fifth article of the complaint, this defendant has no knowledge nor information sufficient to form a belief, except that it is advised that the said city took and paid for water from the said Greensboro Water Company, but denies, on information and belief, that same was under any contract with any (367) one which had any force or validity in law, as any and all contracts attempted to be made, if such there be, by the said city for water were, as defendant is advised and believes and avers, without authority, and being without authority, was invalid and of no effect, as the law under which the city undertook to contract, as defendant is advised, was not passed as the Constitution of this, the State of North Carolina, prescribes, as same was not read on three separate days in each House of the General Assembly, and the ayes and nays called and entered on the Journals of the respective Houses on the second and third readings in each House.

6. That as to the several allegations made in the sixth article of the complaint, this defendant has no knowledge nor information sufficient to form a belief.

7. That as to the several allegations of the seventh article of the complaint, this defendant has no knowledge nor information sufficient to form a belief, except that, while J. D. Glenn was receiver additional pipes, hydrants, etc., were laid in the City of Greensboro, affording to said city greater quantities of water for which it paid a certain sum unknown to this defendant.

8. That as to the allegations of the eighth article of the complaint, this defendant says that it is true "That by virtue of a decree of the Circuit Court of the United States

in the suit of Middendorf et al., certain property of the Greensboro Water Company was sold by commissioners Taylor and King on the 30th of April, 1896, to Hugh L. Pope, and a deed made therefor to said Pope. It is referred to and will speak and show what was sold and conveyed, and any and all allegations in said article made, inconsistent with and not shown by said deed, are denied.

9. The defendant, answering the several allegations (368) of the ninth article of the complaint, says that it has no knowledge nor information sufficient to form a belief, except that it [is] true that the defendant took control of the property conveyed to it by said Pope, and has been extending and operating same, with extensions and additions made thereto, since it purchased same, and has been receiving compensation and income therefor; and, further answering as to Exhibit "A," the defendant says that as to whether any such was ever executed, or attempted to be executed, it has no knowledge nor information sufficient to form a belief; and, further, that if it were, same could not, as defendant is advised and avers the fact to be, have been entered into as a valid contract by the City of Greensboro without express authority and power granted and given by an Act of the General Assembly of North Carolina, read on three separate days in each branch thereof, and the ayes and nays called and entered on the respective Journals of said Houses on the second and third readings, and then submitted to and ratified by a majority of the qualified voters in and for said city, at an election to be held therefor, which was never done, and lack of authority and power vested in said city this defendant pleads and relies upon as matter of defense to any recovery in this action. Defendant further denies that it assumed all the obligations and duties imposed on the Greensboro Water Company.

10. The several allegations of the tenth article of the complaint are denied.

11. That as to the truth of the several allegations made in the eleventh article of the complaint, this defendant has no knowledge nor information sufficient to form a belief, except that the Benbow House was partially destroyed by fire on or about the time mentioned, but defendant, on in- (369) formation and belief, alleges that same was without any fault or failure on the part of this defendant to do anything it should have done.

12. That as to the allegations made in the twelfth article of the complaint, this defendant has no knowledge

nor information sufficient to form a belief, but it expressly denies that there was any lack of water pressure.

13. That as to the allegations made in the thirteenth article of the complaint, defendant says it has no knowledge nor information sufficient to form a belief, except as to the allegations of insufficient or lack of water pressure from the first and at all times during the fire, and this the defendant denies on information and belief.

14. The defendant, answering the allegations made in the fourteenth article of the complaint, says that it has no knowledge nor information sufficient to form a belief, except that all allegations in this article made, or in any other article of the complaint, to the effect that there was an insufficient pressure, if properly controlled, are denied.

15. The defendant, for answer to the allegations of the fifteenth article of the complaint, to the effect that the defendant was in any way negligent, or in any way failed to perform any contract or obligation legally binding on it, is denied; and it further denies that it failed wilfully, tortiously or otherwise to furnish water or to perform any obligation or duty to the said city or other person, and likewise, every allegation to the effect that defendant failed in any duty to anyone, that it was in any way negligent or committed any wrong towards anyone, or failure as to any duty, is denied; and it further denies that plaintiff was damaged in any sum by any fault, neglect or failure of duty to plaintiff or other person.

16. The defendant denies any and all allegations in (370) the sixteenth article of the complaint to the effect that the defendant negligently or otherwise failed to perform its obligations to the said City of Greensboro and its inhabitants and taxpayers, and especially towards the plaintiff; and it denies that it carelessly, wilfully and negligently failed to keep a sufficient quantity of water in its storage water tank for the purpose of extinguishing fire, or other purposes to which it was applied.

17. The allegations of the seventeenth article of the complaint are denied.

18. The allegations of the eighteenth article of the complaint are denied, except there was sufficient hydrants in and near said hotel, amply furnished with a sufficient quantity of water, to have extinguished the fire.

19. The several allegations of the nineteenth article of the complaint are denied.

20. That as to the several allegations of the twentieth article of the complaint, this defendant has no knowledge nor information sufficient to form a belief, except that it denies that there was any negligence or omission of duty on its part, and that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, were the proximate cause of the destruction of the hotel property, whereby the defendant company became liable therefor.

Wherefore, defendant prays that the case be dismissed and that it recover its costs.

KING & KIMBALL,
Attorneys.

STATE OF MARYLAND, }
Baltimore City. }

W. C. Seddon, being first duly sworn, says that he is secretary of defendant, Greensboro Water Supply Company, and that the facts set up in the foregoing answer (371) are true of his knowledge, except those stated on information and belief, and as to these he believes them to be true.

W. C. SEDDON.

Subscribed and sworn to before me, on this the 11th day of October, 1899.

[Seal] MURRAY HANSON,
Notary Public.

Second Answer of Defendant.

NORTH CAROLINA, } Superior Court.
Guilford County. }

B. J. Fisher
against
Greensboro Water Supply Company.

The defendant, for answer to the allegations made in the several articles of the complaint in the above entitled action, says:

1. The defendant does not deny the allegations made in the first article of the complaint.

2. Defendant does not deny the allegations of the second article of the complaint.

3. That the allegations of the third article and the

several subdivisions thereof of the complaint, as to the contents of the contract therein referred to, not sustained by said contract, are denied.

4. The defendant does not deny the allegations of the fourth article of the complaint.

5. That the allegations made in the fifth article of the complaint, as to the contents and provisions of the contract therein referred to, not sustained and borne out by said contract, are denied,

(372) 6. The allegations of the sixth article of the complaint are not denied.

7. The allegations of the seventh article of the complaint are not denied.

8. The allegations of the eighth article of the complaint are not denied.

9. The allegations of the ninth article of the complaint are not denied.

10. The allegations of the tenth article of the complaint, other than that the defendant should keep its hydrants supplied with water, and in good order, are denied.

11. That it is admitted that the Benbow House caught on fire about the time mentioned in the eleventh article of the complaint; and as to the other allegations therein, this defendant has no knowledge or information sufficient to form a belief.

12. As to the twelfth article of the complaint, this defendant has no knowledge nor information sufficient to form a belief; and, further, there is no allegation of duty nor obligation to furnish any water in any pipe in the hotel for fire purposes or otherwise.

13. As to the allegations of the thirteenth article of the complaint, defendant has no knowledge nor information sufficient to form a belief; and, further, the contract under which defendant is operating does not provide for any particular pressure for fire or other purposes.

14. Defendant, answering the fourteenth article of the complaint, says it has no knowledge nor information sufficient to form a belief as to the truth of the allegations therein made.

15. The allegations of the fifteenth article of the complaint are denied.

16. The allegations of the sixteenth article of the complaint are denied.

(373) 17. The allegations of the seventeenth article of the complaint are denied.

18. The defendant has no knowledge nor information sufficient to form a belief as to the allegations of the eighteenth article.

19. The allegations of the nineteenth article of the complaint are denied.

20. The defendant has no knowledge nor information sufficient to form a belief as to the allegations of the twentieth article of the complaint, except as to the allegations of negligence and omission on the part of this defendant; and, as to these, same are denied.

BYNUM & BYNUM,
KING & KIMBALL,
Attorneys for Defendant.

J. D. Glenn, being first duly sworn, says that he is superintendent of the defendant, the Greensboro Water Supply Company, and that the facts set out in the foregoing answer are true of his own knowledge, except those stated on information and belief, and as to those he believes it to be true.

J. D. GLENN.

Sworn and subscribed to before me this the —— day ————, 1901.

————————,
Notary Public.

Verified properly.

(374) And at a special term, 1901, the following proceedings were had:

B. J. Fisher
against
Greensboro Water Supply Company.

In this case the following jury sworn and empanelled: (1) Isaac J. Harvey, (2) W. T. Hodgin, (3) E. D. Clapp, (4) J. T. Hodgin, (5) W. M. Montgomery, (6) J. M. Anderson, (7) G. W. Long, (8) J. T. Shoffner, (9) J. G. Anderson, (10) H. M. Coble, (11) J. M. Cunningham, (12) W. D. Mendenhall, who, for their verdict, say to the following issues:

Issues.

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, as set out and described in the complaint, in the quantity and for the purposes set out? Answer. "Yes."

2. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. "Yes."

3. Did the defendant company fail to comply with its contract? Answer. "Yes."

4. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

(375) 5. What damages, if any, has the plaintiff sustained? Answer. "Yes; $25,000."

Judgment of the Court.

NORTH CAROLINA, Guilford County. } In the Superior Court, Special Term, January, 1901.

B. J. Fisher
against
Greensboro Water Supply Company.

This cause coming on to be heard and being heard before his Honor Judge Timberlake and a jury, at the January Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury, and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, set out and described in the complaint, in the quantity and for the purposes set out? Answer. "Yes."

2. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. "Yes."

3. Did the defendant company fail to comply with its contract? Answer. "Yes."

(376) 4. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

5. What damage, if any, has the plaintiff sustained? Answer. "$25,000.00."

It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff, B. J. Fisher, recover of the defendant, the Greensboro Water Supply Company, the sum of twenty-five thousand dollars ($25,000) damage, and for the costs of this action to be taxed by the clerk.

E. W. TIMBERLAKE,
Judge Presiding.

Judgment Tendered by Plaintiff.

NORTH CAROLINA, Guilford County, } In the Superior Court, January Special term, 1901.

B. J. Fisher
against
Greensboro Water Supply Company.

This cause coming on to be heard and being heard before his Honor Judge Timberlake and a jury, at the January Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury, and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, set out and described in the complaint, in the quantity and for the purposes set out? Answer. "Yes."

(377) 2. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. "Yes."

3. Did the defendant company fail to comply with its contract? Answer. "Yes."

4. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

5. What damages, if any, has the plaintiff sustained? Answer. "$25,000."

It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff, B. J. Fisher, recover of the defendant, the Greensboro Water Supply Company, the sum of twenty-five thousand dollars ($25,000) damage, for the tortious injury and damage done him by the negligence of the defendant, and for the costs of this action to be taxed by the clerk.

_____

Judge Presiding.

Case on Appeal.

NORTH CAROLINA, Guilford County. } Superior Court.

B. J. Fisher
against
Greensboro Water Supply Company. }

This was a civil action, tried before Timberlake, Judge, and a jury, at the January Special Term of the Superior Court of Guilford County, brought by the plaintiff to recover damages as set out in the pleadings. The following are copies of said pleadings: (The clerk will here copy complaint, together with attached exhibits, and the short or second answer, and the summons in said cause.)

Upon the trial, his Honor submitted the following issues, which the jury, after hearing all the evidence, answer as hereinafter appears. (The clerk will here copy the issues and the answers, together with the evidence.) After rendition of the verdict by the jury, as hereinafter set out, the plaintiff, in apt time, tendered to the court the following judgment: (The clerk will here copy the judgment as tendered by the plaintiff), which judgment the judge refused to sign. To such refusal of the judge to sign the judgment as tendered by the plaintiff, the plaintiff excepted. The court, thereupon, signed the following judgment: (The clerk will here copy the judgment as signed by the court.) To the signing of which judgment the plaintiff excepted, and in open court gave notice of appeal to the Supreme Court. Notice waived and bond fixed at fifty dollars.

The plaintiff assigns the following as errors to the ruling and action of the court:

(1) That the judgment of the court, as set out in the record, is not responsive to the issues.

(2) That the judgment as rendered leaves the character of the recovery in doubt as to whether it is a judgment in contract or a judgment in tort.

(3) That the court erred in declining to sign the judgment as tendered by the plaintiff.

(4) That the court erred in signing the judgment set out in the record, and refusing to sign the judgment tendered.

(379) We hereby accept the foregoing statement of case on appeal tendered by defendants in lieu of plaintiff's statement as served, and agree that the same may be the statement of case on appeal.

This 26th day of February, 1901.

A. L. BROOKS,
JNO. N. STAPLES,
Attorneys for Plaintiff.

Testimony in the Case.

J. H. PHIPPS, witness for plaintiff, testified as follows:

Q. Mr. Phipps, what position did you occupy, at the time of the Benbow fire, with the fire department of Greensboro? A. I was chief of the fire department.

Q. Do you remember the time of the fire at the Benbow Hotel? A. Yes, sir.

Q. What time did you arrive there after the alarm was given? A. I suppose in the neighborhood of from three to five minutes after.

Q. What time of day was it? A. About 12 o'clock.

Q. State to his Honor and the jury what was the condition of the fire when you got there? A. When I first reached the scene the Eagle Hose Company were laying their line of hose. I helped the company to make their connection, and then went immediately to the end of the line which the Eagle Hose Company had in their possession. Mr. Stone, the foreman of the hook and ladder company, had charge of it, and by the time I got to him, after doing this other work, they had ascended the ladder, and when they saw they could do no good—

Q. Just say what they did? A. Proceeded to the top of the ladder, and as I started to tell you—

Q. Just state what was the condition of things? A. (380) After I investigated with Mr. Stone, the amount of water shown from the nozzel was impossible to do anything.

Q. A few minutes after the alarm was given, when

you got there, there was no pressure, and could you do anything towards putting out the fire? A. Could we do anything?

Q. What did you do? A. Nothing.

Q. Why could you do nothing? A. Because the pressure was not sufficient.

Q. The pressure was insufficient? A. It was insufficient to do any good from the top of the ladder or from the top of the Benbow House.

Q. I will ask you this, Mr. Phipps, what was the condition of the water supply at the Benbow House when you got there at that fire for fire purposes? A. Judging from the line of hose laid, it was worthless.

Q. You were not able to do anything with the fire? A. That is right.

Q. Did you notice any ladders about there anywhere? A. The hook and ladder truck was there.

Q. They had this tall, aerial ladder? A. Yes, sir.

Q. Who had the ladder? A. It was in possession of this line of hose from the Eagle Hose Company; they took it up on the ladder—

Q. Where was it? A. In front of the Guilford Bank.

Q. Were any other hose attached then? A. Yes; but it was shut off at the nozzle.

Q. What was the condition of the pressure of the water on that hose at the ladder attached to the hydrant on the corner of Sycamore street? What length of stream did you have? A. Probably five feet, maybe.

Q. How far do you say the stream went? A. About five feet; not over that.

Q. How far did that fail of reaching the fire in the (381) hotel? A. Just merely touched the windows of the fourth floor, or you might say really the third floor. It was between, or right at the juncture of where the new part joins the old.

Q. What part of the hotel was the fire in? A. It was in the wing running out on Sycamore street.

Q. It was just above the kitchen? A. Yes; it was supposed to have originated at that point.

Q. How long was this lack of water pervading during the fire? A. Well, it was for—I could not really say, being busy—probably three hours or more.

Q. What other company was there besides yours? A. The Steamer Hose Company and the colored company and the West End Hose Company.

Q. What kind of a stream could the colored company throw? A. In a manner worthless, and I had it shut off.

Q. What do you attribute the lack of water to? A.

The only reason that I thought we could not get any from the top, at the top of the Benbow House, I thought was because we were probably about as high as the tank is.

Q. Was there lack of pressure sufficient to reach the fire?

(Defendant objects. Objection sustained. No exception.)

Q. Please state to the jury how long this line of hose was that was attached to the hydrant in front of the Guilford Bank? A. From a rough guess, I suppose three hundred feet, probably.

Q. Was there any other hose attached—any in front of the Benbow? A. Not at that time. A line in front of the drug store on corner of West Market and South Elm.

Q. How many lines from that hydrant did you say? A. Only one.

(382) Q. How high could you throw the water from that place? A. I could not say. It was taken up the steps through the house—a little later it probably reached ten feet.

Q. Would you recognize a photographic description of that fire? A. I think I would, sir.

Q. You say you would recognize a photographic description of the fire—is this it? A. Yes, I think so; this one is before that (referring to two photos. in his hands).

Q. Mr. Phipps, you say you were chief of the fire department at that time? A. Yes, sir.

Q. State whether or not it was properly equipped with everything necessary to fight fire? A. We were equipped with everything, with the exception of an engine.

Q. Was the engine there? A. Yes, sir.

Q. State whether, in your opinion, with the appliances you had and the equipments for the purpose of extinguishing fire, if you had had sufficient water there, could you have put out the fire?

(Defendant objects. Objection sustained. Exception by plaintiff.)

Q. State why you did not put it out? A. In the first place, lack of water; in the next place, the engine broke down.

Q. What do you use the engine for? A. To get a better pressure.

Q. Where does the pressure come from for the purpose of a fire? A. We generally have very fair pressure from the hydrants and get a stronger pressure and better from the engine.

Q. The pumps of the water works are for what? A. To keep the tank filled, and when pumping against a full tank, it is bound to give better pressure.

(383) Q. You state that the reason you did not put it out was for the lack of water.

(The court objects to repetition.)

Q. I will ask you how far it was from the end of the nozzle held by the gentleman on the ladder; was it to the top of the building, or to the fire? A. I could not exactly say as to where the fire was, the nozzle, I should say, was four or five feet from the building.

Q. How far would that throw the water? A. Just merely touched the building.

Q. Hardly touched the building? A. Yes, hardly touched it.

Q. Never touched the fire? A. No, sir.

Q. Do you know what story the fire was in? A. Not positively.

Q. Your best judgment? A. About the fourth to the fifth story.

Q. How long was it after the fire department got there before you got water enough to control the fire? A. About three hours; about that.

Q. I would like for you to state to the jury whether or not the men under your authority did all in their power—all that was possible to extinguish the fire? A. (Under objection by defendant.) The fire boys, I thought, did everything in their power in every respect.

Q. Do you know how far it was from the ground to the top of the building? A. I don't know.

Q. What would be your estimate? A. About fifty or sixty feet, I suppose.

Q. How high, with the usual pressure upon the hydrants, will one of these hose throw water?

(Defendant objects. Objection sustained.)

Q. How high ought the proper pressure to throw water?

(Defendant objects.)

(384) Q. Mr. Phipps, from three to four hours after the fire had begun, was there any other engine here other than the Greensboro engine? A. Two from Winston-Salem.

Q. Well, from three to four hours after the fire had been raging, and the hotel was practically consumed, state if a stream was thrown on it, and how far it went? A. After three or four hours we had a much better pressure. As

to the distance, I could not say how far it went; it would go over the third, and, probably, the fourth story.

Q. Do [you] remember that it went over the building? A. No; it was thrown a considerable distance from the hydrant in front of the hotel, and also from one in front of Mr. Stone's.

Q. How long a stream, in feet, from the nozzle? A. I suppose thirty feet from the nozzle from one, and the other was not quite so strong.

Q. If you had had at the beginning of the fire a stream as long as that just described, that was thrown on three or four hours afterwards, could you have put that fire out? A. Easily.

CROSS EXAMINATION.

Q. Mr. Phipps, the fire originated in the southwest corner of the Benbow building, did it not? A. Yes, sir; I don't know exactly, but it was in the west wing of the hotel.

Q. As a matter of fact, it was difficult to locate just where it originated, was it not? A. It did not seem to be exactly; no, sir.

Q. I understand you to say you never did find out exactly where? A. I did not, but others did.

Q. I am asking you for your own knowledge of it; did you see where it originated? A. No, sir.

(385) Q. And you don't know? A. No, sir.

Q. I will ask you if it did not originate inside in the mansard roof, near the top? A. What kind of a roof?

Q. Is that not a mansard roof? A. I suppose it was.

Q. And the fire originated there? A. I suppose so; it was in the top of the building.

Q. Looking from the outside you could see nothing but smoke coming out, could you: A. No, sir; could not.

Q. You had to go inside the building and up the different flights of steps till you got to the top of the building to locate where it was? A. I had a man on top who knew where it was.

Q. And had to put up ladders to get to the top to find it? A. Yes, sir.

Q. And had to take hose up on top? A. Yes, sir; to the top of the ladder.

Q. The firemen had to cut through the roof, or had it burned through? A. Could not say, don't think it had burned through.

Q. You can not say the full extent of the fire when you got there? A. No, sir.

Q. As matter of fact, the firemen did have to cut

through to get to it, did they not? A. It is my understanding that they did, from the conversation I had with those on top of the building.

Q. And that being so, the way they had to use the water was to carry the hose on top, was it not? A. At that point, on the inside, they had a hose on the inside.

Q. To the top of it was sixty or seventy-five feet, was it not? A. I suppose fifty or sixty feet.

Q. So the water was being forced up sixty or seventy-five feet to reach the ladder on top? A. Yes, sir; to the top of the aerial truck.

(386) Q. The fire never did burn down to the lower floor or the one above that, did it? A. No, sir; never got into the second floor above the office; just burned through the third floor.

Q. When your fire company reached the building and saw the smoke coming out, you went about ascertaining where the fire was, and commenced to lay your hose to put it out; how many lines of hose did you have there? A. At the first, or last, or when?

Q. When you first got there, how many hydrants did you use? A. Two; one in front of the Guilford Bank, one on the corner of West Market and South Elm, and I would say there were three; I saw one of them afterwards.

Q. There was one at Gardner's Drug Store? A. Yes, sir.

Q. And one at the Guilford Bank? A. Yes; near there.

Q. Those were the first to which couplings were made? A. Yes, sir.

Q. There is a hydrant there at the corner of the Benbow House and another near Mr. Dalton's, on Sycamore street? A. Yes, sir.

Q. Another at Stone's printing house? A. Yes, sir.

Q. Did you use all of those hydrants during the fire? A. Yes; during the fire.

Q. How many lines were attached to the hydrant at Gardner's Drug Store? A. You mean where we used the ladder?

Q. I mean the hydrant there at Gardner's Drug Store? A. We used them at different times.

Q. I did not suppose you would couple them all at once. You attached a line of hose to the one at Gardner's (387) Drug Store, and this is the line you carried on top by means of the ladder? A. Yes, sir. I saw it used, did not see it attached.

Q. Was there one or two lines there? A. I only noticed one.

Q. And that was also carried on top of the building? A. It was carried up through the building—up the steps.

Q. You don't know what was done up there; you did not come up? A. No, I passed and noticed it.

Q. You were giving your attention to the line at or near the Bank of Guilford? A. Both received some attention. We discontinued both of them later.

Q. Well, you gave your attention to that first? A. First to that and next to the building.

Q. You then attached one to the Dalton hydrant? A. No; it was a considerable time before any was attached to that hydrant.

Q. How long after the fire started? A. I guess about an hour. Sometime after. I told them to attach and be ready in case they were needed.

Q. Well, there was one to the hydrant near Stone's? A. Away late in the evening.

Q. Well, there was one attached there? A. Yes, sir.

Q. And one attached down near the market? A. Yes, sir.

Q. So, altogether, you had about six lines of hose attached to the different hydrants? A. Not more than three or four at one time in use.

Q. Do you know that there was no more than three in use at one time? A. Not more than three or four.

Q. Which were used all the time? A. The one at the Guilford Bank and at Gardner's Drug Store, and one on Greene street; there was more water taken from them than from any others—the one at the corner of Sycamore and Greene.

(388) Q. That is the one at Dalton's and that was used more than any other? A. Yes, sir.

Q. When they carried the nozzle up on top of the building you say they got water from it? A. Water showed; yes, sir.

Q. How far up did it go? A. Four or five feet; very short distance.

Q. How long was it after the fire started before the engine broke down? A. In a very short while after the fire started.

Q. And you had to get an engine from Winston, and they had to haul two engines here on a special train, and your engine here was incapacitated? A. No; it was fixed so it went to running a considerable time before the others came.

Q. You don't say it was in good condition? A. No; I don't think it could run more than one stream.

Q. And you had to rope and tie it up pretty extensively? A. Yes, sir.

Q. Well, that required a considerable time to do it? A. Yes, a considerable time.

Q. You had to send to the railroad down here for Captain Lee to come up and fix it, did you not? A. No; he was on the ground and came to me and asked if he could help fix it, and I told him we would be glad if he would.

Q. When the fire engines came from Winston, they had you to stop using water from all those hydrants, did they not? A. We used three hydrants during the time the engines were here.

Q. At one time they did have you shut off all the hydrants but three? A. Yes, three were in use.

Q. What ones? A. The one on Greene street, the one in front of the Guilford Bank and the one at the drug store.

(389) Q. Where did they station their engines? A. At these hydrants. The Salem engine was at the Sycamore and Greene street hydrant and the Winston engine at the one at the Guilford Bank, and the home engine at the place where it started—at the one at the drug store.

Q. The two engines from Winston were at the two hydrants at Greene street and in front of the Bank of Guilford? A. Yes, sir.

Q. Only one stream from each hydrant, or more? A. Only one stream.

Q. Did they not require that you cut off all but one stream? A. Who?

Q. The Winston firemen? A. No, sir.

Q. They only took one stream from the hydrants where their engines were located? A. Yes, but no requirement was made.

Q. I am speaking of the facts as to what they did, and you say they only had one stream? A. I would not swear that positively; I don't know of only one stream. I know Salem wanted two, and I told them one was sufficient for what they had to do.

Q. Well, that was when the fire was nearly out? A. Yes, sir; pretty well done.

Q. Were you using all the hydrants then? A. As many as three were open.

Q. What were they doing with the other stream? A. The one near Mr. Stone's was putting out some little technical things in the building there.

RE-DIRECT EXAMINATION.

Q. For what purpose do you have engines at fires? A. To get a strong, swift pressure.

Q. An aid to the hydrant? A. Yes; can get better pressure from the hydrants—the engine forces the water.

(390) Q. What was the condition of the fire when the Winston company came? A. It was under control, or nearly so.

Q. The building was practically consumed before they got here? A. As far as it would go.

Q. Do you remember whether an effort was made to put out a sign of Mr. Kauffman's? A. Yes, sir.

Q. State what you know about it—where was his store? A. In the corner of the Benbow House.

Q. How many stories to the store—how high was it? A. I suppose fifteen or eighteen feet.

Q. What kind of a sign was it? A. It was a large sign.

Q. Was there an awning there, too? A. Yes, sir.

Q. Did it catch fire? A. Yes, sir.

Q. Who made an effort to put it out? A. The colored team turned their hose on it and failed to reach it.

Q. And it was only fifteen or twenty feet; where were they attached? A. From the market, I suppose. I suppose, it was about fifteen feet from the ground.

RE-CROSS EXAMINATION.

Q. You don't know anything about the quantity of water in the tower, do you? A. Not of my own knowledge.

Q. Where was the man standing who had the hose trying to put out Kauffman's sign and the awning? A. On the corner of the Benbow House.

Q. Did he put out the fire? A. I think he did not, then.

Q. It was put out, and with water, was it not? A. I don't know.

Q. Did you have any other means than water? A. It was put out with a stream from the engine.

Q. Well, they had to use water to put it out, and you (391) did put it out, and it was with water furnished from these hydrants? A. Yes, sir.

RE-RE-DIRECT EXAMINATION.

Q. You had to get up on a ladder to do it, didn't you? A. Yes, sir.

J. J. STONE, for the plaintiff.

Q. Mr. Stone, do yeu remember the fire at which the Benbow was destroyed? When did it occur? A. I don't

beieve I can tell exactly the time; it was about 12 o'clock.

Q. What month? A. In June.

Q. What time did you reach there? A. I suppose I reached it in two minutes after the alarm was rung in.

Q. What position did you occupy in the fire company? A. I was foreman of the Hook and Ladder Company.

Q. What experience, Mr. Stone, had you as a member of the fire company? A. I had been a member of the company about six or seven years at that time.

Q. State what experience you had while such member in handling equipments? A. I attended them frequently—most all fires.

Q. You had been chief of the department? A. Yes, about four or five years.

Q. Were you familiar at that time with the equipments of the company? A. Yes, sir.

Q. We considered that we had a first-class department; at least I did.

Q. Well, did you have a first-class department? A. We did.

Q. There has been some reference made to an aerial ladder; I wish you would describe to his Honor and these gentlemen of the jury the construction of that ladder and the purpose for which it is used, and all about it? A. It (392) is a aerial ladder. The ladder extended is 48 feet long; there are two ladders together, and by means of a crank and chain, which may be extended, so as to make a splice, and it's 48 feet long; you can turn it completely around if you want to, and it is raised by means of a screw—two screws.

Q. You can put this ladder out there and a man can go up on it? A. Yes, sir; and extend the fly or the second limit after the main ladder is raised.

Q. How high is it when fully extended; how high is the full limit from the ground? A. About fifty-three feet from the grounnd, being fully extended to the top of the ladder.

Q. When you reached the fire on the occasion referred to, had there been any line of hose attached to any hydrant? A. No, sir; the company was coming in when I arrived at the fire; the first to report, I think, was the Eagle Hose Company.

Q. Did you see the first hose attached? A. No, sir.

Q. Did you know it was attached? A. Yes, sir.

Q. Where was it? A. I think from the hydrant in front of the Guilford Bank.

Q. Did you see it? Where was it? A. I think it was attached to the hydrant in front of the Bank of Guilford.

Q. How many hose were attached to that hydrant? A. I think that was the only line, so far as I am able to judge.

Q. State whether or not, in passing down there, you saw any other hose attached at the time? A. No, sir; did not.

Q. Did you see the stream from that hose when it was first turned on? A. No, sir. It was over on top of the roof, and I could not see from the ground; it was taken on top of the kitchen up the ladder first.

Q. Explain where this ladder was situated. A. It was (393) immediately against the walls—probably six or eight feet from the wall of the kitchen of the old Benbow.

Q. It was not then up there at the building of Dr. Benbow? A. No, sir.

Q. Who went up the ladder to it? A. I think it was Mr. Billie Smothers and Richard Turner, I think, were the first ones.

Q. How long was that stream of water from that hose being turned on before any other was turned on from any other hydrant? A. I could not tell that. I do not know what was going on there. I was giving my attention to this particular stream.

Q. Where were you stationed when the gentlemen carried this line up? A. At the the truck. I ordered the line up the ladder.

Q. How long after they went up there before they reported to you? A. These two men, I should have said, went up first before taking the hose up, and asked for a line of hose, and I ordered the line to be taken up, and I assisted in taking it up, and they came and assisted in taking it up.

Q. Well, how long before they reported to you as to the pressure of the hydrant? A. I suppose five or ten minutes.

Q. State to his Honor and the jury what these men reported to you about it as to the amount of water. A. Said the stream they were getting was doing no good, and if they had sufficient pressure they could save it; or words to that effect.

Q. After that report was made, what did you do? A. I ordered them down and moved the position of the truck.

Q. Where did you move it to, Mr. Stone? A. About midway between the length of the building, nearest to South Elm street.

(394) Q. How high did you raise it up there? A. I could not tell. I do not remember whether we had the fly fully extended or not, but we used the fly.

Q. Did you turn the stream on the building from the hose at that time? A. Yes, sir.

Q. State the length of the stream at that time thrown from the truck? A. I don't know that I could give it exactly. From the position we occupied, I would say was more than half way from the ground to the top, and it would not throw a stream to the top of the building.

Q. Could you reach the ceiling up there? A. No, sir; could not reach the mansard roof, it was burning around that roof.

Q. After you were unable to reach it there, what did you then do? A. We left our position there and came around on the Main street side, front of the building, nearly opposite Mrs. Howard's book store, and kept that position.

Q. After you had made these efforts and moved your position three times and failed to do anything, the fire had by that time caught or got around to the front? A. Yes, sir.

Q. Did you see where the fire originated? A. No, sir; I did not.

Q. What size hose, Mr. Stone, was used by your company? A. Two and one-half inch hose.

Q. What was the size of the nozzle? A. We had various sizes—the largest was one and one-fourth inches, and we have some as small as one-half an inch.

Q. State from your experience as a fireman, and your knowledge of the equipment and efficiency of this company, what length stream of water would it have required to enable you, on this occasion, to extinguish the fire you (395) found there? A. I don't know. I could not answer that question unless I knew exactly how high the building was. Would say, if we had had sufficient pressure—

(Defendant objects.)

Witness says: You can't get any length of stream without pressure.

Q. How long a stream would it have required to get to the top? A. I should say about sixty feet.

Q. State whether or not, when the hose was first carried on top of the building, it would have required a sixty foot stream? A. No; I don't think it would. It is not that high. I mean, from the ground.

Q. When you were on the ladder it was not that high, was it? A. No; not so much would have been needed.

Q. From the end of the nozzle, you mean? A. Yes, sir.

Q. You said a stream thrown from one of these hydrants with a single hose, did you? A. Yes, sir.

Q. With the aid of the engine, state how high the pressure threw it? A. Could throw a stream in the fourth story.

Q. State to his Honor and the jury whether or not, if, when you first reached the fire, if, in your opinion, with your knowledge of the fixtures and appliances, and your experience as a fireman, if you had had the same length of stream that was afterwards furnished, could you have extinguished the fire as you found it?

(Defendant objects to this question.)

Counsel repeats it, as follows.

Q. State, Mr. Stone, from your experience as a foreman—as an expert fireman, and your acquaintance with the equipment and appliances, and the efficiency of the Greensboro department, the hose, nozzles and implements (396) which you then and there had, whether or not, if the defendant company had furnished from that hydrant a pressure sufficient to throw a stream of water as far when you first reached there as you saw them three hours afterwards throw with a single hose, unaided by engine pressure, whether or not, in your opinion, you could have extinguished the fire and saved the plaintiff's building from burning?

(Defendant objects. Objection sustained. Plaintiff excepts.)

Q. State why the fire was not extinguished and the plaintiff's property saved from burning? A. Well, I should say from lack of water—pressure of water.

CROSS EXAMINATION.

Q. It was a very difficult fire to fight, was it not, Mr. Stone? A. Under the circumstances, it was.

Q. Yes; it originated in the top of one of the highest buildings in the city? A. Yes, sir.

Q. And it was very difficult to locate exactly where the fire was at first? A. I would not consider it so. I had no trouble in locating it.

Q. You could not see the flames when you got there, could you? A. Immediately between the kitchen and dining room I could see the fire about the partition walls.

Q. So, you say the flames were coming through the roof when you got there? A. Either through the roof or in this space between the upper roof and the lower one.

Q. You got there about two minutes after the alarm was turned in? A. I say so.

Q. And you say that the fire had then been raging a sufficient time for you to see the flames coming through the roof? A. Either through the roof or some open place there.

Q. Some aperture there? A. Yes, sir.

(397) Q. It was in the southwest corner of the building? A. It was nearer the center of the wing; in the west wing, on Sycamore street.

Q. How long was that building on Sycamore street? A. What was the length of the building? I should say 110, 115 or 125 feet; I mean, the wing the narrow way is that length; the entire length of the Sycamore street frontage, and the fire was in the wing the short way.

Q. Mr. Stone, the information I am seeking to elicit from you is the length of the Benbow on Sycamore street? A. I should say 125 feet, about that.

Q. I next desire to know what part of the building was burning? I mean, when you got there, near the corner on Sycamore street? A. That is what I am trying to explain. The frontage on Sycamore street we will say is 128 feet, and the width is between forty and fifty feet; the fire was about twenty-five feet from the end—about the center of the forty foot width.

Q. The fire occurred in the month of June? A. Yes, sir.

Q. In the summer time? What time of day? A. Just a few minutes after 12, I think.

Q. The date was the 17th of June, and when you arrived there that is what you found as to the progress the fire had made, and as to the place it was burning; now, how high was that building at that time? A. You mean the top of this place where it was burning?

Q. I mean the Benbow House? A. I guess about forty or forty-five feet.

Q. That fire, Mr. Stone, spread in the direction of South Elm street, did it not? A. Yes, sir.

Q. It caught in that mansard roof? A. Yes, sir.

Q. And burned its way out to the corner on South Elm. Now, what was the first thing your firemen did when they got there; you, of course, attached the hose to the hydrant? A. I had nothing to do with that.

(398) Q. As a matter of fact, that was done, was it not? A. Yes, sir.

Q. And you directed that the nozzle be taken up on top of the building, and it was necessary that you should put up your ladder and have a man carry it up, and when

you got it up on top of the building a stream of water came out of the hose about five feet long? A. I could not say as to the length.

Q. Well, it did come out, and the two young men, Mr. T. and Mr. S., said the stream was doing no good? A. Virtually that.

Q. And that they could not successfully fight the fire with the stream they were getting, and then you ordered them to come down, and they brought the hose back down the ladder? A. Yes, sir.

Q. Do you know how close they could get to the fire with the nozzle? A. I do not know; I did not go up on the ladder to the top.

Q. And in the meantime the fire was spreading more rapidly? A. I don't know how rapidly it was spreading.

Q. And it was a very slow fire, and you could tell only from the smoke as to the progress it was making; and when they came down where did you direct them to go with the hose? A. Yes; it was a very slow fire. Yes, it was a slow fire. I ordered the truck placed about twenty to twenty-five feet nearer South Elm street than it then occupied, twenty or twenty-five feet near to South Elm.

Q. Did you put the ladder up again? A. Yes, sir. In the middle of the street, about midway the building.

Q. You raised the ladder about in the middle of the building and turned the water on, and how high did it go then? A. I tried to throw it over in this direction, over against the building; the ladder, should say, was about (399) forty feet high, and I tried to reach the mansard roof with the stream from the ladder.

Q. Was the ladder higher than the building? A. No, sir; fifteen feet from the building.

Q. And you tried to throw the water from the ladder on to the building; and did not that affect the length of the stream? A. May have affected it some.

Q. How long were you fixing the ladder there in the truck? A. I should say from a half to three-fourths of an hour.

Q. Where were the other fire companies? A. I don't believe I can state accurately.

Q. How many companies were there? A. I could not tell you where they were. They were scattered all over the place. This was the company I had in charge.

Q. Do you know how many streams were thrown on the building there at any one time? A. I don't believe I can tell accurately. I know there were as many as three, and possibly more.

Q. Yes; you were getting water from every available hydrant? A. I suppose they were.

Q. And had the hose laid out there along the street in different places? A. Yes, sir.

Q. Did you notice the breaking down of the engine and how long it was after it broke till it was fixed? A. I did not know it was broken until after it was fixed.

RE-DIRECT EXAMINATION.

Q. You said to Judge Bynum that the ladder in the second position where you placed it there in the street was fifteen feet from the building? A. Yes, sir; I should say so.

Q. And you could hardly throw the water to the walls, could you? A. No, sir; hardly touched them.

Q. These hydrants that have been spoken of so much—(400) they were attached to the one in front and at Gardner's Drug Store, and to the one in front of the Guilford Bank? A. Yes, sir.

Q. Now state if these hydrants were situated along the main line of the defendant company's main pipe? A. Yes, sir; I think it goes down this street out here.

Q. That is the main line from the tower to the reservoir? A. You mean from the pumping station to the reservoir? Yes, sir.

Q. State how far it is, how many feet from the hydrant at the corner of Gardner's Drug Store to the other hydrant at the Guilford Bank, from which the water was taken on this occasion? A. It is 450 feet, or about that.

Q. Mr. Stone, from where you described to Judge Bynum that you saw the blaze oozing out of of the mansard roof, how far is it from that point where the men whom you sent first on the house with first nozzle—about how far? A. I should say within five or six feet.

Q. And you could do no good in that direction with the stream you had?

(Defendant objects to repetition.)

Mr. JOHN M. HAMMER, for the plaintiff, testifies:

Q. Mr. Hammer, at the time of the destruction of the Benbow Hotel, were you living in Greensboro, and, if so, what position did you hold? A. I was living in Greensboro; was one of the clerks at the Benbow Hotel.

Q. State what was the construction of the building, was it frame or a brick building? A. Well, frame and brick.

Q. What was it covered with? A. I don't know what

it was covered with: some kind of metal, I think, but am not positive.

(401) Q. Yes, a metal roof—a mansard roof covered with slate? A. Yes, sir.

Q. You remember the occasion of the fire alarm, when the fire broke out? A. Yes, sir.

Q. When you first found it was on fire, Mr. Hammer, where did you go, and what did you do? A. I ran up stairs to where the smoke appeared to be coming from over to the left wing of the hotel.

Q. Describe just where you found it, and the size of it, and everything? A. The fire was in a little place there where the kitchen joins, I think, between the two flues, or near one of them and what I saw of it was a small place—a great deal of smoke, and I got hold of the hotel hose.

(Defendant objects to what he did with the hotel hose.)

Q. On what floor was this fire—in the ceiling or between the ceiling of the fourth and third? A. It was in the fourth, right in there between them.

Q. Were you the first one there to see the fire? A. Yes, sir.

Q. State the size of the place and the fire at that time? A It was a small place; further back in there it might have been more; I could not see it.

Q. You were not in a position to see all of it. State the size of what you saw? A. Well, I suppose it was as large as a good size hat brim. I don't know exactly; not a very large place that I saw.

Q. In the meantime, had the fire alarm been given? A. Yes, sir.

Q. What did you do towards putting it out there?

(Defendant objects. Sustained. No exception.)

Q. Mr. Hammer, state whether or not there was a hydrant situated in the Benbow Hoted at the time of this fire which tapped the main line of the defendant water com-
(402) pany's pipe, and to which hydrant there was a line of hose attached, with the knowledge, consent and approval of the defendant water company, for purposes of extinguishing fires that might occur in the Benbow House?

(Defendant objects. Sustained. Exception.)

Q. State, when you first found the fire, what you did. A. I took hold of the hotel hose.

Q. Tell where they were and how they were arranged?

A. They were on the second floor, and attached to the plug, which was about shoulder high, or four feet on the wall, and I took it back up the steps to where the fire was.

Q. State whether or not there was more than one hydrant in the building with hose and nozzles attached to them. A. On the second floor and third floor, three hydrants. They were attached on the first floor, but on the second I don't think they were at first.

Q. I mean were they equipped with a nozzle and hose to each of them? A. Yes, sir.

Q. Go ahead and describe what you saw; you got hold of the hose, and what did you do with it? A. I took hold and somebody called to me to go down and get the kinks out.

Q. Well, you—did you go to get the kinks, and did you get them out? A. Yes, sir.

Q. When you left to go back to get the kinks out did you meet or see anyone coming towards the fire; and if so, who? A. I saw Mr. Bob Douglas; I am pretty certain it was him; and I went on down to where the hose was fastened to get the kinks out.

Q. Did you straighten out the hose so the water could pass? A. Yes, sir.

Q. What did you then do? A. I went back to the fire, and by that time the smoke was getting so thick it was filling the house.

(403) Q. State what length of stream was being thrown from the end of the nozzle attached to those hose, if any. A. Yes, there was water in the hose, and a short stream was being thrown.

Q. How long? A. Not very long; probably six feet; something like that, I would say on a guess.

Q. State whether or not the stream continued as good as that or whether putting out the fire there was abandoned for the lac of water? A. It was abandoned for my part.

Q. For what purpose; lack of water? A. Yes, sir.

Q. From the size of the fire and its location, how much water, Mr. Hammer, in your opinion, in gallons, would have been required to extinguish it? A. How much in gallons did you say? I don't know; can give my opinion about it. From what I saw it looked to me like—well the place I saw ought to have been extinguished with some ten or a dozen buckets of water.

Q. When you were there when the water was being turned in, state whether or not the door—that little door there—had been turned up so you could see in? A. Yes; there was an opening there.

Q. And you could see in? A. Yes, sir.

Q. State whether or not over the new part—or the old, whichever you call it—whether there was a tin roof out there near this. A. There was.

Q. I believe it is a matter of fact that this front part of the building was a story higher than that? A. Yes, sir.

Q. State, Mr. Hammer, if anyone was standing on the tin roof on the rear of the building next to the wall and near to the place where the fire was when you first saw it. A. I did not see anyone there.

Q. I will say if there was any one there, how near could they get to where you saw the fire? A. I did not see anybody.

(404) Q. I am asking you if there was anyone there, how close to the fire could they get? A. Right jam up to it.

Q. Thereafter, Mr. Hammer, did you take part in attempting to extinguish the fire with another hose? A. Yes, sir.

Q. When and where? A. I went to work to get some things down when we saw we were not going to be able to control it—went to work to save what we could; and then went down on the ground outside and into the street and took hold of the hose there and tried to put out a place that was catching Kauffman's awning.

Q. Look at this photograph and see whether it is a photograph of yourself at the time holding the nozzle and turning the stream on? A. I was there, it is not very plain; I was there in that position.

Q. Yes; it is not as good looking as you are; but you were there trying to throw water on Kauffman's awning?

(Plaintiff desires to offer the photographs in evidence. Objection overruled. Defendant excepts.)

Q. State, Mr. Hammer, from where you were standing in the middle of the street, whether or not—

("If he was in the middle of the street," by defendant's counsel.)

Q. Were you in the middle of the street? A. I was not in the middle of the street, I was nearer the sidewalk, where the Benbow was.

Q. State if you could throw a stream strong enough to hit Kauffman's sign? A. Was not able to do so.

Q. On what story was it? A. Ground floor.

Q. How high was it? A. Awning over the door.

Q. How long was it, Mr. Hammer, after the fire had begun, about how long, if you know, was it that you had hold of the hose out there trying to put out the sign? A. (405) I could not say how long; I suppose it was some-

thing over an hour. I know it was after I had helped to carry out several things out of the building—an hour or an hour and a half.

Q. Did you see, later on in the evening, a stream thrown through one of these hose—thrown from a hydrant without engine pressure? A. I don't remember specially about the engine pressure, whether they had that or not; they were able to throw it a considerable distance.

Q. How high? A. To the top of the building.

Q. State if they threw it over the building—over the top? A. I do not remember if they did,

Q. Mr. Hammer, how long was the fire burning there before the property was destroyed? A. It caught *above* 12 o'clock, and it was burning, I don't know exactly how long.

Q. I don't mean the embers? How long before the building had burned—practically burned down? A. Two or three or four hours.

Q. Mr. Hammer, state whether or not in a day or two after the fire, you, together with Captain Fisher, took the hotel hose, referred to before in your testimony, with the ordinary hydrant pressure and tested the distance at which it would throw a stream of water?

(Defendant objects. Overruled. Exception.)

A. Yes, I was with Captain Fisher at the time.

Q. How far did the stream go above the nozzle?

(Defendant objects. Overruled. Exception.)

A. I don't know how far—seemed to be a good stream.

Q. The jury can't tell any thing by that; how far did they throw it? A. We were up stairs in the second flat and had the hose out of the window, and it threw it clear over the roof, and we were in the middle of the building, to the best of my recollection, and threw the water over the roof, I don't know how many feet.

(406) Q. Well, was it as much as thirty feet? A. Yes; it must have been about that.

Q. How far from the roof? A. We were in a window of a room in the Benbow on that roof, about midway of the room. I think the Captain had the hose.

Q. How large was the room? A. About ten by twelve, I suppose

Q. And the stream was about how long;? A. Well, I should say it was thirty-five or forty feet.

CROSS EXAMINATION.

Q. What was the first notice you had of the existence of that fire? A. The smoke.

Q. Where were you when you first saw the firemen? A. On the sidewalk.

Q. What sidewalk; on which side of the street? A. Nearest to the hotel on South Elm street.

Q. And you saw the smoke at what place? A. I saw the smoke coming out from the rear of the kitchen flues and ran upstairs.

Q. You must have been standing on the corner of South Elm and Sycamore streets? A. No, sir; not on the corner. I was in front.

Q. In front of the hotel office? A. I was there near the corner of Kauffman's store, in the corner of the Benbow.

Q. Between the corner of Sycamore street and hotel office? A. You know the building, Judge, goes along Sycamore street, this way—

Q. I don't care anything about that. I am trying to locate you? A. Well, I was right there, about the corner of the hotel, and I went into the hotel.

Q. What corner? A. At the lower corner.

Q. This Sycamore street corner? A. Yes; I guess it is that. I was not thinking then.

(407) Q. Well, you were at the corner of South Elm and Sycamore streets, and you could see the smoke coming out about the top of the kitchen, and you thought there must be a fire in the hotel, and you ran in; and had the alarm been turned in then? A. Shortly after or about that time.

Q. You had it given as soon as you could? A. I don't know who did it.

Q. Where did you go? A. I went up to where the fire was, or where the smoke was coming from.

Q. When you got up the first flight of steps and on the first floor you did not see any smoke or fire? A. No—yes, there was some smoke.

Q. Then you went up another flight and then another; and that took you where? A. I went up to the fourth story.

Q. And there you found a good deal of smoke? A. Yes; considerable smoke.

Q. Where was the fire burning? A. In there underneath; well, I could not say exactly where; the kitchen roof does not come up as high as the other.

Q. So the fire was burning down there between the floor and the ceiling of the third floor? A. Yes; at the end of the hall, between the roof and the ceiling of the kitchen. I saw a small place.

Q. You don't know what space the fire was burning over? A. I don't know; that was what I saw.

Q. You could see without going out in the hall? A. Yes.

Q. Anyone else there with you? A. Several others.

Q. Can you name any of them? A. I remember that Mr. Douglas was there.

Q. Do you remember seeing Mr. Dick or Mr. Thacker there? A. I don't remember. I suppose they were.

Q. I want to know if you saw them? A. I believe I did.

(408) Q. Did they have this hose in operation when you got there? A. They were taking it up stairs.

Q. Did you see the water turned on? A. No.

Q. Where did you go then? A. I went back down stairs.

Q. To the hotel office? A. No. I went down the steps, seeing if there were any kinks in the hose, as someone had called me to do it.

Q. Then did you go back up stairs? A. And I met Mr. Obrien trying to get one of his trunks out.

Q. Yes; he was a guest of the hotel, wasn't he? A. Yes, sir.

Q. Who had the hose then? A. I don't remember.

Q. Don't you remember Mr. D—— asking you to come on and help, and said you were not going to do it; that you were going to get your trunk out? A. No, I don't; but I do remember that I did not get my trunk. After some time I went to help them get the things out; but, at first, I thought we were were going to be able to control the fire.

Q. And when you found out you couldn't control, you went to gettings out? A. Yes, sir.

Q. Who did you leave with the hose when you left up there? A. There was a crowd around there I don't remember who had it.

Q. In about an hour after that you went down and tried to throw some water on Kauffman's sign? A. Yes.

Q. That was on the lower story of the hotel? A. Yes.

Q. That line of hose, the nozzle of which you had, was attached to a hydrant on Davie street, was it not? A. I don't know where it was attached. It was the colored hose, I think.

Q. And, at that time, the whole top of the hotel was burned off, wasn't it? And some of the cinders or some-
(409) thing had fallen down there and caught the awning? A. Not the whole top. It was burning, and some of the timbers were falling over.

Q. And this was what caught the sign and the awning? A. I guess so. I did not see it catch.

Q. Did they bring the line of hose up between the old and new parts of the hotel, about the drug store? A. Yes; they had the hose along there.

RE-DIRECT EXAMINATION.

Q. You said, in reply to Judge Bynum, that you thought at first you would succeed in getting it under control, and that the fire would be put out? A. Yes.

Q. State why that fire was not put out? A. Because we did not have a sufficient supply of water to put it out.

JOHN M. DICK, witness for the plaintiff, testifies.

Q. Mr. Dick, do you remember the fire spoken of here, in which the Benbow property was destroyed? A. Yes.

Q. I believe it was about 12 o'clock? A. It was a few minutes before 12.

Q. Where were you when the fire first occurred? A. I was in the office of the hotel. It was Saturday, the 17th day of June, if I recollect right. It is my custom to go around every Saturday and settle with the clerks for the transient laundry, and I was straightening up with Mr. Matthews, the clerk at the Benbow; and there was a Mr. Wright, a brother to the piano man, has a long black beard, came in and told Mr. Matthews there must be a fire in the hotel. He is a brother of John B. Wright. Mr. Matthews sent a negro boy to see what was the matter, and he came back in a few minutes and (410) said he could find no fire, and we went on with our work; and some one came in and told Mr. Matthews that there was so much smoke coming out that the hotel must be on fire. He was busy, and I told him that I would go up and see; and he made some remark about no dependence could be put in a negro. So I said I would go, and, knowing there was only one place in the hotel where they would have any fire, I naturally went to the back of the building, on the fourth floor, towards the kitchen, and found a fire in the west wing of the hotel.

Q. Describe how the fire was, Mr. Dick? A. The hotel proper is a four-story building. To the rear of the fourth story is mansard roof. Later on a kitchen was built, and that is only three-stories, and where the roof of the third story part of the building joins the mansard roof it is covered with tin, and that is the extreme west end of the hotel. I suppose that addition is twenty-five feet in width, running east and west. It was a tin roof, almost flat, and sloped up to the mansard roof. Tho flue of the

kitchen is in the extreme west end, and the fire must have originated from that flue, because when I got into the hall of the fourth floor I could see in a window in the end of the hall an opening on the roof. In this window, back of the wainscoating, which is four-inch planks, I could see the fire through these cracks, and I ran there and kicked a hole in the cuddy—kicked the cuddy hole in and the whole wainscoating was on fire, and all back there I could see the fire. I could not see the entire length, because there was so much smoke. Right under this window the fire was burning in a space about six feet wide, and had burned up to the window, and was burning the wainscoating underneath the window. I thought a bucket full or two of water would put it out, and started back for it and met Mrs. Ca-
(411) tor, and asked her for one of those glass bottles that have some kind of a chemical preparation in them to put fire out; and she said, get the hose, and one of the bell boys was told to get the hotel hose; and we got it, started up the stairs with it, and this negro and I got nearly to the top of the steps before any assistance came, and then Mr. John Thacker came and we pulled the hose down as close as from here to that table, right at the fire, and it was some little time, we waited for the water to be turned on, and when they did, we had a fairly good stream, and threw it underneath this roof and clear back to the wall, twenty-five feet, but that pressure only lasted for three or four minutes, and gradually weakened, and it would not run out of the end of the hose, and I saw there was no use staying there any longer. The hotel was burning—and I went downstairs to gather up my books and get out of the way; could do no further good.

Q. How many minutes would it have required to extinguish that fire if the pressure had been good, as it was at first? A. I should say that in ten minutes time we could have put out every particle of fire in the hotel.

Q. State whether or not, as soon as you found the fire and turned the stream on, could you see the effect of the stream on it at first? A. Yes; we could have put all that fire out. The roof had never been burned over—was still intact. We put the water all over it, and it never did catch again.

Q. Now, Mr. Dick, after you say the water stopped—got so weakened you could do no good with it—you then went down stairs? A. Yes.

Q. Did you see the hose that worked down there; and if so, tell what you saw as to the quantity of water they were getting? A. I came down in the next floor and found the South Greensboro Hose Company, and Henry

(412) Phipps was there, and they had a hose down there, and I told them the fire was on the next floor, and we had put enough water there to wet all of it on the second plastering. And there was no fire there. We had put all that fire out; and, in the meantime, it had burned down between the mansard and the plaster, and gone on into the hotel. The South Greensboro people had a hose, but could not get any water. It would not run out of the end of it.

Q. Did you, then, go down stairs and see any other stream attempted to be thrown on? A. Yes: I went into the office. Thought I would look after my books which I had left in there, and someone told me they had been sent to Mrs. Robert Lindsay's. I saw there, on Sycamore steet, two or three lines of hose; all seemed to be in use. I went on to Mrs. Lindsay's, got my books, and went immediately to the laundry, and another hose was attached in front of Odd Fellows building. Between my building and Mrs. Gorrell's I saw four distinct lines of hose when I came down stairs. There were two lines attached to the hydrant near Dalton's, one on the corner of the Benbow, and up here. I saw those four.

Q. Just one on the corner of the Benbow, one at Daltons, and one back down here? A. Yes; two at Dalton's.

Q. Water was coming from all of them? A. I don't know. After that they were all in use—later on.

Q. State to his Honor and the jury what was the length of the stream thrown from the ground or from any given point two and one-half hours after the fire started? A. I was on the top of Dr. Benbow's house—was wetting the roof to keep it from igniting. Almost in front of me I saw some men on the hook and ladder truck, and they were try-
(413) ing to throw the water on the building, and could not get it on the roof. It would not go to the eaves of the mansard. Both lines were attached to the hydrant on Dalton's corner.

Q. What was the longest stream you saw there at that fire for two and one half hours after it started? A. I don't suppose the stream would go fifteen feet from the end of the nozzle. I stayed on top of Dr. Benbow's house for perhaps an hour.

Q. Did you see the parties that went up, went up on the ladder on to the tin roof of the kitchen? A. I recollect seeing a ladder against the building, but did not see anyone up there.

Q. How long did you stay there, Mr. Dick? You stayed around about there until the fire was put out, did you? A. I stayed around there until it was about out. I went and got a hose from the corner of Green street. There were

some other parties along—need not tell their names; but we got that hose on top of the bar-room, and then on to the shed or the glass part that they use as a sample room. Had nothing but the city pressure an hour and a half after the fire commenced, and we had a fairly good pressure—on the level with the second story, and put out considerable fire. That was after the roof had fallen in.

Q. Do you know that later on in the progress of the fire, the natural pressure got so you could check the fire so as to prevent from burning the other property further up the street? A. No; I was not on that side. We put out what smouldering fire we saw around there, and in the meantime the engines had come.

Q. You mean the two engines from Winston? A. Yes; I understood so. They threw water all around there and wet us.

Q. You are familiar with the purpose for which they are used? A. To make increased pressure and give additional force.

(414) Q. They are in the nature of a pump to increase the pressure? A. Yes.

Q. Mr. Dick, did you see this stream thrown from the street in front of the Benbow by Mr. Hammer and others, in trying to put out that sign in front of Mr. Kauffman's store? A. No; I have no recollection of it.

Q. Later in the evening, towards night, did you see a stream thrown from the street with just hydrant pressure, without the aid of the engine? A. As soon as the fire was under control, I went down home and took a bath and changed my clothes, and did not go out of the laundry any more until 10 or 11 o'clock that night.

Q. State whether or not it was a slow or a rapid fire? A. Rather slow fire, I should say.

Q. From where you were speaking of where the fire originated in the mansard roof, was that on the end next to the roof of the kitchen, and on the side next to Sycamore street? A. The west wing of the hotel is on Sycamore street, and the kitchen part is still an extension of that wing, and was only three stories high, and where I first saw the fire it was a little west, looking west to the right of the window, right underneath, in the wainscoting under the window. That was north in line with the flue of the kitchen. It burned right up to this window, by the window facing in the fourth story.

Q. State whether or not from the roof in the bar-room and the roof on the kitchen, where you went with the hose, state if you could get to it easily? A. I don't think they could have got to it from the roof of the bar-room, A par-

apet wall was built up there. They would have had to break the slate.

CROSS EXAMINATION.

Q. Mr. Dick, your attention was first called to the fact that this fire was in existence by Mr. Wright coming into the office? A. Yes, sir.

(415) Q. He came in there and informed Mr. Matthews that the hotel must be on fire, because of the smoke which he saw coming out? A. Yes, sir.

Q. Mr. Matthews was the employe of Captain Fisher, was he not? A. Yes, sir; the clerk on duty at that time.

Q. Mr. Wright is one of the citizens here in town? A. I don't know whether he is or not.

Q. Well, he came in and informed Mr. Matthews, Mr. Fisher's employe, that the hotel must be on fire, and what was the response? A. Why he rang the bell for the boy.

Q. Yes; he just rang the bell, just as if he were going to have him accompany a gentleman to his room? A. He rang the bell and the boy answered.

Q. Well, just as if he were going to send a gentleman to his room? Where was he? A He was there in the office. The boy came, and he sent him to see if there was any fire.

Q. Yes; and what did Mr. Matthews say to him? A. He told him to go and see if there was any fire.

Q. And he went up stairs. How long was he gone before he came back and reported that there was no fire? A. About ten minutes, I suppose.

Q. And said there was no fire? A. Said he could not see any.

Q. How long before Mr. Delorm came in and reported that there must be a fire in the hotel? A. About another ten minutes, I suppose.

Q. He was the bar-keeper there in the hotel, was he not? A. Yes, sir. I will not be positive as to the time. We were busy there staightening out the books and accounts.

Q. Well, he did come in and said there certainly must be a fire? It had already been reported to Mr. Matthews, (416) and still he did not go himself to see about it? A. It was just about train time, and he was busy there in the office.

Q. I am merely speaking of the fact. He did not go himself, did he? A. No; he did not go

Q. And you, a gentleman who had come in there on business, went yourself? You were not interested in that hotel, were you? A. No, sir; only interested as any citizen would be.

Q. You just went because someone said there must be a fire in the hotel? A. Yes; I told Mr. Matthews I would go and see to it.

Q. Well, you went on up the stairs yourself, and you thought, except in the cooking apartments, there were no fires in the grates and heaters, and you naturally went to the neighborhood of the kitchen? A. Yes; that was my idea.

Q. Yes; and a very correct idea. Well, you discovered the smoke when you went upstairs? A. Yes; Mr. Delorm said there was a lot in the roof, and I did not stop till I got to the roof.

Q. You got to the fourth floor, and you went and you went and kicked in the little door, or what do you call it? A. The cuddy hole.

Q. And all the roof was on fire plumb back to the wall? A. It was not over six feet in width; it was burning straight back to the flue of the kitchen.

Q. A distance of thirty-five or forty feet? A. No, not over twenty-five feet, I should say.

Q. Underneath the tin roof of the kitchen? A. Yes, sir.

Q. How long was it from the time Mr. Delorm came in till you discovered the fire? A. I went as hard as I could; not more than a minute.

Q. And then you went up there alone to see about it, (417) and none of Captain Fisher's employes went with you? A. I saw no one till I got to the second floor.

Q. And you came back down by yourself, and it was you and not one of his emyloyes that saw Mrs. Cator, and asked her to let you have some of the preparation they have to put out the fire, and requested her to send a message to Mr. Matthews; and did he come? A. No; I did not see him.

Q. And you did all you could and inquired of Mrs. Cator for these chemicals, and Mrs. Cator suggested that you get the hose? A. She told the boy to get the hose down.

Q. Where was the hose? A. It was hanging on the wall, about the height of a man's head, on the second floor; and when the boy brought it I grabbed the nozzle and started upstairs with it.

Q. In what part of the second floor is that hose located? A. It was near to what was then the linen room, about the center of the hotel.

Q. You went and got the hose down and carried through the hall and up two flights of steps; the first stairway is a winding one; winds round this way, does it not?

A. It curves a little, but we pulled the hose straight up through, and got it to the fourth floor.

Q. And then took it back to the place where the fire was? A. Yes, sir.

Q. And when you reached the place you sent some one back to get the kinks out of the hose and turn the water on? A. No; before I got there; was pulling the hose upstairs; two or three others came, and I think Mr. Rob Douglas was there and Mr. Thacker, and I had hold of the nozzle and called back for the water to be turned on.

Q. Did you call two or three times? A. Yes; two or three times.

(418) Q. There was present Mr. Douglas, Mr. Thacker and yourself when the water was turned on, and you had a fairly good stream? A. There were five or six of us there. When first turned on we had a fairly good stream.

Q. Could throw the water back twenty-five feet? A. Just about that.

Q. And if something had not supervened and cut down the supply you could have extinguished the fire? A. Yes, sir.

Q. After four or five minutes you say the stream ceased—just went down? A. Yes, gradually.

Q. Well, something had to cause that. It was there at the beginning and continued for four or five minutes? A. Yes, sir.

Q. Well, you did not draw out all the water there was in tank during that space of time, did you? A. I suppose we threw fifty or seventy-five gallons.

Q. The reason your stream up there gradually weakened was because the firemen had come up below and attached their hose and were drawing through all these hose out there, and destroyed your pressure? A. That would tend to do it.

Q. I ask you if these fire companies had not come and destroyed your pressure, if you could not have put out that fire? A. I don't say that was the cause. I do say if the pressure had not been interfered with we could have put out the fire in a few minutes.

Q. You know that something interfered with it, and the best of your judgment is that it was the drawing out of the water from these hydrants? I ask you as an expert fireman? A. I am not a fireman; that was the only one I had experience with; but I have had experience with the city water—have it in my laundry—and am acquainted with the use of it as a laundryman.

Q. I ask you if this jury shall find from the evidence (419) in this case at that time that the tank was full of

water, and you having drawn out fifty or seventy-five gallons, and that there was as much in the tank after you lost your pressure as when you had it, if you would not say the reason you lost it was on account of the water being drawn out of the hydrants by the compainies?

(Plaintiff objects. Objection sustained.)

Q. Mr. Dick, you say that was a slow fire? A. It burned very slowly.

Q. It was burning at a place where the wind could not get to it? A. It was in the tin roof, on top of the slate roof, inside, and the fire could not burn the slate or the tin—just a smoldering fire; the smoke was like that coming from a coal kiln; could get no draft.

Q. The reason was because the wind could not get to it? A. Yes, sir.

Q. Is it not very difficult to fight a fire burning in a metal roof more so than in an ordinary shingle roof? A. Speaking from my own judgment, I should say it would be a difficult matter to get to that fire—would have to break the slate. I don't believe there is any water pressure that would break that slate.

Q. When your pressure gave out up there you came downstairs, and you say you went up on top of Dr. Benbow's house; now, I will ask you if you saw the hose attached to the hydrant at Dalton's corner; and is so, how many lines were there? A. Two attached there.

Q. Tell me, if you please, where those then attached to that hydrant were carried and used; what part of the building? A. One line went down Sycamore street and was used by the Hook and Ladder Company.

Q. Where was the company located? A. Just about opposite the kitchen.

Q. On Sycamore street. Was that the hose they carried on top? A. Yes, sir; men were on the ladder when I saw them.

(420) Q. How high was the ladder? A. Five feet; not over that.

Q. The hose came down the street this way and reached up the ladder, and was used from that point A. Yes, sir.

Q. Were there any other hose carried up on the ladder? A. I helped pull it up on top of Dr. Benbow's house. Sparks were dropping over there.

Q. That building is thirty or forty feet high? A. It is a two-story building, I suppose, thirty or thirty-five feet high.

Q. You had water there, did you; you got water to protect it? A. Yes; we wet the roof of that building good.

Q. And prevented it from burning or catching any more? A. It caught two or three times. It was an old roof, with more or less moss on it; had a negro up there with a broom and a bucket of water part of the time.

Q. You didn't put it out? A. Yes; we wet the roof good.

Q. Was there a line attached to the hydrant down here? A. At the corner of Greene and West Market, near the Odd Fellows' Hall.

Q. How may lines were attached there? A. Only one, I think.

Q. Where was that carried? A. Up the street, between the laundry and Mrs. Gorrell's.

Q. How many feet of hose were laid out there to cover that distance? A. I would have to guess; I should say, 450 feet.

Q. Was that hose taken on top of the building? A. On top of the bar-room.

Q. That room was about fifty feet high, wasn't it? A. When I came around there they already had the hose up there, and I merely assisted in pulling the hose; it was heavy, and I helped to pull it.

(421) Q. In order to get from this hydrant, at the corner of the Odd Fellows' Hall, you would have to wind and twist about a good deal? A. More or less winding to get through the hotel.

Q. Well, you got the water there? A. Yes; had pretty good pressure.

Q. And you could throw the water over into the main building? A. We could stand on the bar-room and throw the water all over in the building, twenty or twenty-five feet off.

Q. And you saved the new part of the building? A. I don't think we had much effect on that. They had a hose inside of the building.

Q. Well, as a matter of fact, it was saved? A. Yes, sir.

Q. How many lines of hose were attached to the hydrant in front of Gardner's Drug Store? A. I saw the engine there; did not see any hose there at all. I know they were connected there, because I saw them throwing water, but did not see the connection.

Q. They were connected in front of the Guilford Bank, were they? A. I came around after the fire was practically out, and found them throwing water.

Q. That was after the fire was out? A. Yes, sir.

Q. Do you know whether or not there was a connection with the hydrant in front of the hotel or the Guilford Bank? A. I suppose so, because I saw the engine throwing water.

Q. And one with the hydrant on Davie street? A. No, sir; I don't know.

Q. Well, you had not much more than got started when the engine broke down, did you? A. I don't know; only from heresay.

Q. You know that they sent to Winston and got two (422) engines and four companies from there? A. I saw them here. I saw the Salem engine at the hydrant on Dalton's corner.

Q. The Salem engine made its connection there and the Winston engine connected with the hydrant in front of the Guilford Bank? A. I did not see the Winston engine.

Q. Well, after these engines came, they threw water plumb over the hotel? A. I was on the roof of the bar-room and I know the water came clear over the hotel.

Q. Threw it over there and wet you all; and that, you say, was thrown by one of the Winston engines? A. I was told that it came from the Winston engine.

Q. Did the Greensboro engine do any work after it was started? A. I don't know anything about that.

Q. Well, Mr. Dick, after the fire got into this mansard roof, and burned on down or up or along the roof, whichever way you designate it, and burned out to the corner on South Elm street, and then turned round this way, it was then extinguished and did not burn this part here over the Glenn drug store, and Mrs. Howard's, and the telegraph company's office? A. No; there was a fire wall in there.

Q. The fire didn't burn any further down than the fourth and third floors, did it? A. In the dining-room it burned through in one or two places, and fire fell through in the dining-room, and, I think, probably in Kauffman's.

Q. The main fire was in the fourth and third floors? A. Yes, sir.

Q. Mr. Dick, there was a barber shop in one of the floors, kept by a man named Wood? A. Yes, sir.

Q. Do you know the fact that he had fans in there operated by water? A. I don't recollect.

(423) RE-DIRECT EXAMINATION.

Q. Mr. Dick, I understood you to say to Judge Bynum that these hose, with the different attachments you were speaking about, that you found them out just before the fire finished burning? A. No, sir; when I came down out

of the hotel—when they smoked me out—I came down into the office of the hotel to get my books.

Q. And saw the hose in the office. State to his Honor and the jury, at the time you were on the fourth floor with this hose from the hotel; do you know, as a matter of fact, whether there was any other hose attached outside? A. No, sir.

Q. And you don't mean for the jury to understand that the cause of your stream weakening was from the attaching outside? A. I don't know that any were attached at that time.

Q. What position did Mr. Hammer have there at the hotel? A. One of the clerk's of Captain Fisher.

Q. This Mr. Delorm was running a bar in the back? A. Yes, sir.

Q. Mr. Matthews was in the office; anybody else there? A. No; by himself.

Q. State whether Captain Fisher was in town? A. I don't think so.

Q. Know where he lived? A. At Ashboro, I think. I was told that he was out of town and that he came the next day.

Q. Now, Mr. Dick, I will ask this question, whether or not the clerks and employes of Captain Fisher were competent and efficient men? A. I think so. I was thrown with them intimately; most efficient men.

Q. I understood you to say that you took this line of hose right straight up? A. We, of course, had to go down the square hall, and then right up the steps.

(424) Q. State the number of hydrants accessible to this hotel, the number from which water might have been taken? A. I don't know that I am familiar enough with the hydrants; and I am not a fireman and don't know the location of them.

Q. How far is it from the hydrant at Mr. Dalton's to the corner of the kitchen that caught? A. I never measured it; but the hotel takes up nearly half of the block. I should say it would be one hundred and fifty or one hundred and sixty feet from the hotel.

Q. How about the one on the corner of the hotel? A. It was right at it.

Q. The one in front of the Guilford Bank was how far? A. Right opposite the bank.

Q. Well, how far was the bank? A. I should say about two hundred feet, perhaps three hundred feet. I am not familiar enough with it; never measured it. It is not that much; not over one hundred and fifty feet.

Q. How far from the corner of the Benbow House is

the hydrant at Mr. Gardner's Drug Store? A. Just the length of the square, and, I think, they are three hundred feet.

Q. How far does the Benbow run up that square? A. It occupies about half of the square.

Q. Then the distance is about one hundred and fifty feet? A. Yes, sir.

Q. Now, from the hydrant round at the Odd Fellows' building where you say you saw one line attached, how many feet from there to the hydrant in front of the Guilford Bank—the farthest one from which water was being taken? A. Diagonally? I could not say.

Q. No; I mean round the street? A. On which side of the street?

Q. I mean coming up Main street, on the main line of (425) the pipe, and then round that way? A. Seven hundred or eight hundred feet.

Q. Well, you say the hose the fire company was using was the one attached at Dalton's hydrant—the one they were using on the hook and ladder, and afterwards you had another in front of it, on top of Dr. Benbow's house? A. Yes, sir.

Q. How long after the fire originated before you had this hose on Dr. Benbow's house? A. I went first and assisted in carrying out some of the things. Half an hour, I suppose, before I carried that hose up there.

Q. And when you got round there you attached this one and took it up on the house? A. I did not attach it. It was already attached.

Q. Do you know; can you swear as to the time when any of those hose were attached at first? A. I came down, and, as I say, I looked for my books first thing, and I got my books and carried them to the laundry, and that was ten or fifteen minutes after the alarm, and as I passed these hose were attached, two at Sycamore and Greene streets, and one at the corner of the Benbow.

Q. You don't know which was attached first? A. No, sir.

Re-Cross Examination.

Q. I want you to tell the jury on what floor you met the gentleman coming up with the hose? A. I think, on the third. They were already up there.

Q. I want to ask you if it is not true that when you asked Mr. Hammer to come on and help put out the fire, he said "Oh, h—l," he was going to look after getting out his own trunk? A. He said he was going to help get the trunks out.

Q. Didn't he say he was going to get his own trunk out? A. He said it in a jocular manner.

(426) R. E. DOUGLAS, for the plaintiff.

Q. Mr. Douglas, were you a member of the fire department at the time of the destruction of the Benbow property? A. Yes, sir.

Q. What position did you occupy with the company? A. I could not state without looking it up. I have occupied most every position in it.

Q. How long had you been with them? A. Just about three years.

Q. State whether or not you were familiar with the equipments and workings of the company? A. I was, sir.

Q. What was their condition? A. I think they were in very fair condition.

Q. Mr. Douglas, what time did you get to the fire? A. I think a few minutes past 12 o'clock. I was sitting in my office in the Savings Bank building, just across the street from the hotel. At the stroke of the alarm I ran to the sidewalk, and as soon as I got there, in consequence of what somebody told me, I ran up the steps of the Benbow.

Q. State what you saw and did? A. I went up, I think' the ladies' entrance, up the steps, and when I got up stairs Mrs. Cator, and, I think, one of the bell boys, was unreeling the hose.

Q. Who is Mrs. Cator? A. An employe of the hotel. I don't know whether she was matron, house-keeper, or what. She had charge of the servants in the hotel. She was superintending it; it is a private hose in a sort of a little rack, some four or five feet high, and a plug near it. Some one had started up stairs with it, and I followed the hose where it was being carried, and it was carried up a sort of winding stairs to the fourth floor, and when I got up there they were just carrying it out down the hall; when we got down to the end of the hall, there were, I think, two or three men there at the nozzle

(427) That part of the hotel is four stories high, and the kitchen part, a little west of that, is only three stories high, and the kitchen has a shed roof that runs half way up like that. Immediately at the end of the hall was a window, and at the upper part of the hall under the shed roof the fire was coming through the wainscoting, or door or something—a place maybe three feet square; there was a good deal of smoke. I had gotten nearly to the end, and in consequence of what they said, I went back along the line of hose.

Q. Was there any water there? A. None coming out

of the end of the hose, and in consequence of what they called out—

Q. What was said about the water, if anything? A, The people at the end called back, "Give us the water," or turn on the water, and some one said, we have turned it on, and as soon as that was done I came back along the line thinking there might be some kinks, and just at the head of the second stairs Mr. Hammer passed, and I told him to go down stairs and follow the hose and see where there were any kinks and straighten them out, and I straightened those out at the head of the stairs, and just as I had gotten them straingh, and in consequence of what he said, I did not go down.

Q. What did he say? A. Just as he came up he said it is all right. I will state that a kink in a hose, is when it gets twisted this way, and so the water can not get trough, and I felt the water coming through my hands, and that was the last kink I saw; I then ran and looked to see where it was going out, and it was just bubbling out, and I saw I was not needed and came down on the third floor, and went up under it to see if I could see any fire anywhere. The fire was in the fourth, and then I came down and joined my company.

Q. Where did you get up with your company at? A. After I had been in that third floor to see if I could see any fire coming through; my company were already on and did (428) not need me, so I assisted some other company to lay a line of hose, and according to orders from the Chief, or some one, I went through the hotel breaking open doors and warning everybody that there was a fire.

Q. State if there was any water in the hose attached to the company's hydrants, and to what hydrants you saw hose attached? A. I could not be positive about that; my best recollection is, that there was one hose in front of the Bank of Guilford; another to the plug in front of Gardner's Drug Store, and they were coming down the street with it, I think. I did not see any others.

Q. How far in feet was it from the hydrant at the corner of Gardner's Drug Store and where the other hose were attached? A. I should say, roughly, five hundred feet—five or six hundred.

Q. Mr. Douglas, did you thereafter see the stream turned on from the water company through the hose, trying to put water on the fire, and if so, what length of stream was thrown from a single hose attached to the hydrant? A. On account of the duties I was doing at that fire I could not give you any estimate of how long they were, for the first hour or so. After that, I remember they

were trying to throw water into the second story and could barely get it over the windor sills.

Q. Say after an hour and a half. How long was it before they could reach the second story; did they reach the third story at all? A. I do not think we could reach the third story, except with the engines' streams until the fire was practically over.

Q. You are an experienced fireman; what effect does the engine have on the pressure? A. It is practically a force pump, and the pressure very much, and in that way throws the water a greater distance than could be thrown from the ordinary hydrant pressure. It's just a big force pump.

(429) Q. Mr. Douglas, from your experience as a fireman and knowledge of the equipment and efficiency of the fire companies present on this occasion and coupled with the knowledge of character and location of the fire, state whether or not, if the defendant company had furnished a pressure sufficient to throw a stream of water as far in the beginning as they did later in the afternoon, whether or not this fire, in your opinion, could have been extinguished and the plaintiff's property saved from burning.

(Defendant objects. Sustained. Exception.)

Q. Mr. Douglas, did you see the stream of water thrown from this hydrant with the same hose late in the afternoon upon this building? A. No, sir

Q. What length of stream did they throw with the engine pressure, or by the standpipe pressure—about how long? A. I don't know whether it was standpipe pressure or not.

Q. Well, hydrant pressure without engine aid? A. We could when the fire was about over, in putting out charred pieces and objects here and there. I think we could reach to the third story, I was there some time afterwards making it safe for the night, but we did not have as many hose on then.

Q. Are you prepared to say, from your experience and knowledge of the length of stream this defendant company can and as frequently, under like conditions as the company was then situated, as to the length of stream thrown from a single hose and from a single hydrant with ordinary hydrant pressure?

(Defendant objects. Overruled. Exception.)

A. I have frequently seen the stream given from hydrant pressure that, I think, would have gone into the

fourth story of the Benbow—into the fourth-story windows.

Q. Where the fire was? A. Above where it started, but it was not always so; occasionally I have seen it that way.

(430) Q. State whether or not, from your experience as a fireman, and your knowledge of the equipment of the company, if the company had furnished a pressure sufficient to have thrown a stream of water thirty feet, you could have extinguished the fire?

(Defendant objects. Sustained. Exception.)

Q. From your knowledge and experience as a fireman, and your knowledge of the equipment and efficiency of the fire companies, what, in your opinion, was the reason this property was not saved from burning? A. I think we could have saved it if we had had sufficient streams all along, if that answers the question; there are so many things that come into consideration in saving a building.

(Plaintiff excepts to the exclusion of the question as to whether he could possibly have saved it with the water they had.)

Q. State whether you had an adequate supply of water furnished for this fire?

(Defendant objects. Overruled. Exception.)

A. We did not save it.

Q. Did you see a stream of water thrown by the water company from this aerial ladder on the side of the Benbow on Sycamore street? A. I don't think I saw them throw that stream.

Q. Mr. Douglas, state to his Honor and the jury, from your experience and knowledge as a fireman, and with experience in tests and actual operation upon the hydrants of this company, what would be the difference in the length of a stream of water thrown from a hydrant with one hose attached and with two hose attached to the same hydrant, under ordinary hydrant pressure; I will say with the usual hydrant pressure? A. To answer that inteligently will have to give more than a direct answer. The greater the pressure the less difference it will make if you attach another hose. Ordinarily speaking, I should say it would prob-

(431) ably take away twenty-five per cent. It would also depend upon the size of the main from which the plug was taken.

Q. In what respect? A. The larger the main the less difference it would make by adding another line.

Q. Do you know where the largest main of the company is situated? A. Up and down this street out here, I think, sir.

Q. State what deduction in per cent. in the length of a stream for a single hose attached to a hydrant along this main, it would make if another hose was attached to a hydrant, say, four hundred feet distant, from the hydrant mentioned upon the stream being thrown from the first hydrant?

(Defendant objects. Overruled. Exception.)

A. I can not give an intelligent answer in percentages, but I can state that I do not think it would make very much difference on that size main, judging from experience, and not from qualification.

Q. Mr. Douglas, what length of stream of water, in your opinion, from your experience, etc., would it require, continuous stream, to have extinguished the fire with the hotel hose as you found it at first; what length of time with a stream twenty feet would it have required to put it out? A. I could not say as to how much. I think, or rather I thought, that we could have put it out in from fifteen to twenty minutes.

Q. Had you been able to extinguish it in that length of time, would the main body of the hotel have burned, or deen damaged? A. Very slightly.

Q. Did you see an effort made to extinguish the sign, or awning over Kauffman's store? A. No, sir.

CROSS EXAMINATION.

Q. You say you started to the fourth story and when you got to the second floor you stopped? A. No: did not (432) stop; they were taking the hose off the rail and some one had to pull it up the steps.

Q. Any kinks in it? A. I got out a couple at the head of the stairs.

Q. The effect of kinks is to stop the flow of the water? A. Yes, sir.

Q. You never turn on the water till you get in position do you? A. Generally not.

Q. You did not get to the nozzle of the hose? A. No, sir.

Q. You say there were others there. Was Mr. Jno. Dick one of them? A. Yes, sir; and Jno. Thacker and Lee Wharton, and one or two others.

Q. Jno. Dick and J. R. Thacker were the gentlemen who were examining the wall? A. Yes, sir.

Q. Well, they got water there? A. They carried the hose up and I was needed elewhere.

Q. When the water first starts out of the end of the nozzle, under ordinary conditions, it starts light and rises higher and higher, does it not? A. Yes, sir.

Q. Could it have been possible for the water to have been up in that hose that high up unless the pipes along the streets were full? A. No, sir; I don't see how it could.

Q. That is a physical fact and, next, water seeks its level. I will ask you if the fact that there was water up there in that fourth story in that hose, would it not indicate that there was water at least that high in the standpipe? A. Yes' sir.

Q. It would show that that was so? A. Undoubtedly.

Q. How long would it have taken that nozzle uninterrupted, to have exhausted that tank of water? A. Three or four days, I should say.

Q. You could not have exhausted it in three or four minutes? A. No, sir; not if that was the only hose from which it was thrown.

(433) Q. Well, as soon as you got the kinks out, you came down? A. I turned part of the way back and saw the water coming and went on down.

Q. And then you went to notify the guests? A. Not immediately. As soon as I came down; could get almost under where the fire was and could not see any underneath and came on down with the idea of joining my company, if they needed me. I helped to lay some hose on the street, and then, I think, under orders, I went through the house to notify every guest that there was a fire, and for them to take care.

Q. Do you know, as a matter of fact, how many hose—how many lines were laid out at that time? A. I saw two.

Q. You are unable to say whether there were more at the drug store or not? A. There was one at the Guilford Bank and one at Gardner's Drug Store.

Q. The engine was operating there at Gardner's Drug Store? A. I think it was being coupled up when I saw it.

Q. Was the engine throwing water? A. Not at that time.

Q. It did throw water during the progress of the fire? A. Yes, sir.

Q. How long was it before you saw the Greensboro engine playing on the fire? A. I don't remember—some time, because I went almost immediately inside of the building and aided some men in getting out the stuff.

Q. You were in the streets but little? A. The greater part of the time I was in the building.

Q. As a matter of fact you don't know how many hose were laid, out of your own knowledge? A. No; not positively.

Q. Can you recall how many lines were attached to the Greene street hydrant and at Dalton's corner? A. I think one line of hose; both were used most of the time; another short line was put on and left there most of the time to protect Dalton's houses and those other buildings.

(434) Q. Where was the line attached that Mr. Dick used for the protection of Dr. Benbow's house? A. That was it, and another was being used most of the time.

Q. These pipes belonging to the system form a sort of net-work, do they not? A. The mains, yes, to the best of my knowledge.

Q. And if you draw largely on one it weakens the pressure on the others? A. To some extent, yes, sir.

Q. And the greater the draft in number, or quantity, the more it will weaken the stream from the others? A. Yes, sir.

Q. Can you not so draw on one on more that it will destroy the pressure altogether? A. Yes, sir; it is possible.

Q. This hydrant up here is connected with the one on South Elm street by a pipe which forms a right angle? A. The West Market pipe joins this way to South Elm pipe.

Q. They are all connected so that you could go and open up the lowest pipe and drain the whole system, could you not; A. If the gates or taps (?) were open. They are ordinarily open.

Q. Mr. Douglas, you were testifying about some streams—one stream at the last putting out those windows and the mansard roof? A. Wherever there were little places burning and the rafters inside.

Q. Only one stream there? A. I think we had two—one in front of the drug store and one inside the building.

Q. Mr. Brooks had you to say if you had had plenty of water you could have put out the fire? A. I should judge so, from what I saw.

Q. That might be said of most any fire, might it not? A. Yes; if you define "plenty" that way. If we had had plenty we could have put it out.

Q. You don't pretend to say that if we had furnished all we were required to under our contract, you could have

(435) put it out? A. I have never have been able to understand that contract.

(Plaintiff objects to the question and answer. No ruling.)

RE-DIRECT EXAMINATION.

Q. Mr. King asked you if you did not know that the water would not have come out if the main pipes had not been full; now I ask the reverse—if the water failed to come through that pipe, or if the pipe was not full, none would come out. A. No, sir.

Q. *You said in response to Mr. King's* question that the system is constructed something like the arteries of a man's system, and they have water gates, have they not? A. Yes, I think so.

Q. State whether or not there is a water gate situated at the bottom of the tank down here? A. I don't know of my own knowledge.

Q. Do you know of any at all of your own knowledge? A. Yes; there is one at this square and one on Washington street, if I am not mistaken, and they are scattered all over town; those big flats you see in the streets are the gates.

Q. Those are the sewer, I thought? A. I mean those about this big—I don't mean those largest ones.

Q. State to his Honor and the jury what effect the pumping engine at the station of the defendant company would have if it were pumping water up here—the difference in the pressure if it were pumping and the standpipe pressure? A. The difference between that and standpipe pressure—it would very much increase it; I could not tell the percentage.

Q. State if it would increase the pressure on the main out here? A. Yes, sir.

RE-CROSS EXAMINATION.

Q. The fact that the water might not come into the (436) pipes in the fourth story of the Benbow House would not be proof that the pipes were not full below?

(Plaintiff objects.)

Q. It would not be proof of it, would it? A. No, sir; it would not. They might be full and none come out.

Q. They might be full there in the fourth story and none run out? A. If every opening was only that high i would not run out. (?)

Q. I will ask if the force with which water is thrown does not depend largely on what we call the head, and the head is the standpipe yonder, is it not? A. Yes, sir.

Q. The force with which it is thrown depends upon the head—the pumps work against the head all the time? A. When they work they do.

Q. And the resistance is determined by the weight of this head? A. Yes, sir.

Q. You are not able to say what the difference is between the force when the pump is at work and when it is not, are you? A. No, sir.

RE-RE-DIRECT EXAMINATION.

Q. I want to ask Mr. Douglas if he knows how high the tank is? A. No, sir; I do not.

Q. About how high? A. About ninety feet. I have an impreesion; can not state accurately.

Q. Ever been up on it? (Court suggests to ask the engineer these questions.)

BANKS BOON, for the plaintiff.

Q. Mr. Boon, were you a member of the fire department of Greensboro at the time of the destruction of the Benbow House? A. Yes, sir.

Q. How long had you been a member? A. Six or eight years, I think.

Q. Had you had much exyerience in fighting fires and with the operations of the company? A. Yes, sir.

(437) Q. What was the nature of the comyany with reference to its equipment? A. In good shape.

Q. How many companies were present at this fire, Mr. Boon? A. I think four companies.

Q. About how many men are there to a company—were there? A. I think the hose companies are allowed fifteen men and the hook and ladder sixteen.

Q. State whether the usual number were there? A. I think most of them were there.

Q. What time did you get to the fire? A. I was among the first after the alarm sounded. I was not very far from there on my bicycls, and was not very long in getting there—two or three minutes, somewhere along there. I was somewhere along here about the court-house, going to dinner.

Q. How long did you say? A. Two or three minutes—something like that.

Q. Did you see the first hose attached? A. Yes, sir; it was in front of the Guilford Bank.

Q. Did you see the first hose attached? A. In front of the Guilford Bank.

Q. Well, go on and state what was done? A. Well, the Hook and Ladder Company drove up about that time and the hose was laid and they ran the aerial ladder out and lines of hose were carried up, and I don't remember that any hole was cut, or whether we opened the attic to get into the fire.

Q. How far were you from the fire? A. Ten or twelve feet; not far.

Q. Describe what pressure, or what amount of water you had? A. None scarcely at all; six or eight feet from the hose. I stayed there a few minutes and then went into the top story and cut a hole in the ceiling and had a line of hose brought to this story and tried to throw the water into the ceiling, and it would just fall back on us; would (438) not go to the fire at all, and I told them they could stay there if they wanted to, and I picked up a ladder and undid it and went to the ground.

Q. How high was the ceiling? A. I don't suppose more than twelve feet high.

Q. And you could not reach it? A. Yes, sir.

Q. How many minutes were you up there? A. Five or ten minutes.

Q. Mr. Boon, could you see the fire sufficiently well to enable you to tell of the nature and extent of it? A. Yes, sir; I could see the fire.

Q. State from your knowledge and experience as a fireman, and from your knowledge of the equipment of these companies, if you had had a stream twenty feet long you could have saved the building from burning?

(Defendant abjects. Sustained. Exception.)

Q. State why the fire was not extinguished? A. Because we did not have water enough to put it out.

Q. You said you came down; what did you next do? A. I came down and ran an aerial ladder up in the street and I took a line and ran up with the hose, and it would not reach the building from the ladder.

Q. How far was the end of the hose from the building? A. Not over twelve or fifteen feet, at the outside.

Q State how long a stream, in your opinion, from your knowledge of the fire, and your experience as a fireman, would have been sufficient to have extinguished it? A. I think we could have done so with a stream anywhere from twenty to thirty feet.

Q. I wish you would describe this mansard roof as it ran along Sycamore street there; whether it was solid, or at frequent intervals there were windows? A. There were windows along there.

Q. How near would you judge these windows were to each other? A. I suppose about ten feet apart.

(439) Q. How long, Mr. Boon, from the time you reached the fire, before you were able to get a stream thirty feet feet long? A. Never did get a stream any length at all.

Q. How long did you stay there? A. From three-fourths

to an hour, and then I went round on Main street and ran a ladder up in the midele of the street, and we got it from the engine as soon as it was fixed. It was broken when we first went round there.

Q. Describe, if you can, to his Honor and the jury, where the fire went on the inside of the building, on the side next to Elm street, its course? A. I think it came to Sycamore street, to the side of it, and then turned round from the hotel.

Q. Mr. Boon, later in the day after the buildings were about burned down, did you see a stream of water thrown from the hydrant without engine pressure? A. Yes, sir.

Q. At that time, state how many hose were attached to the other hydrants? A. Two, if not three; I won't be positive. I know there was at least two.

Q. State, Mr. Boon, to his Honor and the jury, how high that stream was thrown from the ground; A. All up on top of the buildings, anywhere they wanted to.

Q. From your knowledge and experience as a foreman and acquaintance with the equipment of the companies there, would you say, if you had had in the beginning as good you afterwards had, how many minutes would you say it would have required to save the buildings and extinguish the fire?

(Defendant objects. Overruled. Exception.)

A. It would not have taken very long from the time we got there.

Q. State, from the location of the fire when you first got there, whether or not, when you were standing on the roof there, as you say you were, was it accessible if you had had water? A. Yes, sir.

(440) Q. Did you see an attempt made to extinguish the awning over Kauffman's store? A. Yes, sir.

Q. You try to describe it to the jury? A. I suppose it is ten feet high from the sidewalk. The water would not reach; had to pull it down.

Q. Is this a correct photograph of it? Yes, sir; we were standing not far from the curbing trying to throw the water on the awning there.

Q. I wish you would look at that picture and see if you remember that stream that would not reach the second story? A. No; it would not reach the second story.

Q. You remember it? A. Yes, sir.

Q. Get down there and illustrate it to the jury?

Q. By the COURT: Is that a correct photograph of what took place? A. Yes, sir; the men were standing on

the corner near the hotel and the water would not reach the third story of the hotel; I remember seeing that.

Q. At the time you were attempting to put out that fire, and the water just went against the wall, were there any other hose attached to the hydrant at the Guilford Bank to which you were attached? A. No, sir.

Q. Did you see a stream coming from any of the other hydrants? A. There were some to them.

Q. What length of stream was thrown from them in the commencement of the fire, and along for an hour or so afterwards? A. I don't think I saw any stream that was over twenty feet.

Q. Did the pressure finally get better? A. Yes, sir.

Q. How long before it improved? A. It was some time; I don't know. It had not when I turned loose and came round on Main street.

Q. That was about an hour after the fire commenced? A Yes, sir.

Q. About two and one-half or three hours after the fire when the stream had gotten to their best, what length (441) could they throw? A. They could throw a stream up in the building most anywhere.

Q. With all the hose attached? A. Yes, sir.

Q. Do you know the height of that building, or at the place where the fire was, about how far from the ground? A. I suppose about forty feet to where the fire was; something like that.

CROSS EXAMINATION.

Q. Mr. Boon, you belong to this ladder crowd, and you don't handle the hose at all? A. Yes, sir; no, I don't carry the hose.

Q. There is another team that carries the hose? A. Yes, sir.

Q. And your business is to go and locate your wagon and raise the ladder? A. Yes, fix it so they can get the hose up and help carry it up.

Q. So then it really is your business to handle the hose? A. It is really not our business, but we usually help to do it.

Q. It is not your business to go to the hydrants and attend to connecting the hose there? A. No, sir.

Q. And you went and located this ladder on Sycamore street? A. Yes, sir.

Q. And they connected with the hydrant near the Bank of Guilford and the one on South Elm street? A. Yes, sir.

Q. It was probably how far in going round the corner

there; how far to where you located the wagon? A. I would think about one hundred and fifty feet of hose was laid to the wagon.

Q. Do you think one hundred and fifty feet would reach from that hydrant on up South Elm street and around that corner and down Sycamore to your wagon; did you say one hundred and fifty feet? A. Yes, or two hundred feet.

Q. Don't you know that its a double square, and that (442) it is divided by another street running east and west; it's a double square, isn't it? A. No, sir; not a street in between.

Q. Don't you know that it is double the distance? A. I never measured it. I don't think it is double.

Q. Is not the hydrant at the corner of the Bank of Guilford further down South Elm street than the bank is, further south? A. I think it is not far from the store next to it, below it.

Q. You say you could reach up here to the corner of West Sycamore street and back up that street to your wagon—what is the frontage of the Benbow House on West Sycamore street? A. I don't know.

Q. Don't you know it's one hundred and fifty feet, approximately, and how are you enabled to say you could reach up to your wagon on that street with one hundred and fifty feet, or even two hundred feet of hose if you don't know the distance? A. I thought it was; I don't know positively.

Q. You ran up your ladder to enable you to get on the kitchen? A. Yes, sir.

Q. When the ladder is fully extended, how high is it? A. Forty-five feet, I think.

Q. Don't you know that it is fifty-two feet? A. What is?

Q. Don't you know that ladder is fifty feet when fully extended, as testified to by Mr. Stone? A. No; I never heard his testimony. I think it is forty-five feet.

Q, And when it is on the carriage and fully extended, how long is it? A. It might have been fifty feet.

Q. Was the fly extended? A. Part of it; not all of it.

Q. Well, it took a corresponding amount of hose to get to that? A. Yes, sir.

Q. What was the total length of the hose? A. Three hundred and fifty feet, I suppose.

Q. From the time you went round there on Sycamore (443) street to the time you came away, how long was it? A. Between three-fourths and an hour.

Q. Standing there all the time at your post of duty? A. Yes, sir.

Q. I want you to tell how it is that you know that there was but one line attached at the Bank of Guilford? A. Yes; we could see from the ladder down there.

Q. I will ask you if that hydrant is not further south than that vacant place there? A. Yes; but you can see there.

Q. Do you swear that you could stand on the kitchen of the hotel there and see that hydrant in front of the Guilford Bank? A. Yes, sir; I remember looking down there one time and saw it.

Q. And that was the position you had that enables you to swear that there was but one line attached to that hydrant? A. There was not but one when I looked.

Q. Well, you saw that hydrant from your position there on the kitchen and know all about it? A. No, sir; don't know all about it.

Q. Well, you say there was but one line attached? A. That's all I remember seeing.

Q. As to how many lines were attached at the Benbow corner, you know that also? A. No, sir.

Q. Know how many were attacred at the Market House? A. No, sir.

Q. Know how many lines were attached to the one at Gardner's Drug Store? A. I know that the engine was there.

Q. How many were attached, if you know of your own knowledge, were attached at the corner of Market and Greene streets? A. Only one when we passed.

Q. How many were attached at the Dalton hydrant, of your own knowledge? A. I don't remember seeing but one when we moved our truck.

(444) Q. You did not hear Mr. Dick say there were two, did you? A. Yes, sir.

Q. How long had the fire been burning when you saw these men standing in there (referring to the picture)? A. It had been some time.

Q. Well, how long? A. I guess it had been burning an hour; that just an opinion.

Q. Of course, it's just an opinion; and they were trying to get in here to the third story? A. Don't know, sir.

Q. Well, this indicates the exact condition that existed at that time (the picture)? A. Yes, sir.

Q. And the fire had then been burning an hour? A. Yes, sir.

Q. And later the stream got better? A. Yes, sir.

Q. No doubt about that, is there? A. No, sir.

Q. Now, I will ask you to tell which of those pictures were taken first. A. This other one.

Q. Do you say that was taken subsequent to this one up here? A. No; this was taken first.

Q. I will ask you if the building shown here does not show more destruction than in the other one?

(No answer.)

Q. That picture indicates the conditions at that time, and this one at the time it was taken? A. Yes, sir.

Q. And you say this one was taken first? A. No, sir; I say this one was taken first.

Q. You say that was taken first? A. Yes.

Q. Did you not say the stream got better? A. It was after that.

Q. That picture indicates it after it got better? A. No; it had not gotten better at that time.

Q. You said just now that that picture was taken last? A. I did not mean that.

Q. Well, you said it? A. That was taken last and the stream improved after that.

(445) Q. And yet you swear it would not go to that awning? (Take your seat, sir.)

Q. Did you see the Greensboro engine playing on the fire at any time during the progress of the fire? A. I had that nozzle on top of the ladder.

Q. It had been broken down? A. Yes.

Q. The engine broke down and they fixed it, and then what took place? A. I got a line of hose up on the ladder.

Q. Was the engine throwing water before it broke down? A. I don't remember seeing it.

Q. And you went into the hotel to get the hotel hose? A. What hotel hose?

Q. Did you not say that after you went on top of the kitchen you came down and went into the hotel? A. We brought in the line we had. I never saw the hotel hose at all.

Q. What floor did you go to? A. To the third story—upper floor.

Q. Don't you know that all the hotel was four stories, except the kitchen. A. We went to the top floor.

Q. And you were trying to throw the water to the ceiling probably twelve feet high, and it would not reach there? A. Yes, sir.

Q. You were on the top floor? A. Yes, sir.

Q. And you got water up there? A. We had a little.

Q. It would fall back twelve feet? A. Yes, sir.

Q. How many feet higher were you then than when

you were on the kitchen, which was only three stories high? A. I don't remember, sir.

Q. Approximately, how far? A. I suppose ten feet higher.

Q. And you tell these gentlemen of the jury that you could not get water when you were on the roof of the kitchen ten feet lower than the other part, and that you got (446) water on top of the hotel on the top floor, and could throw it up? A. No; I don't think I said that.

Q. When you left there, what did you do then? A. I went down and got on the aerial ladder.

Q. On what street? A. Sycamore street.

Q. You first went up on the kitchen, and then after you came down from there you went up into the fourth story of the hotel, and then your second position was a higher one than your first had been, was it not? A. My recollection is that we had just come down one story below.

Q. If the main building was four stories and the kitchen was three stories high, and you came down a story below, that would put you on the second story, wouldn't it? A. We were right next to the roof.

Q. Then you were a story higher than the kitchen? A. Yes, sir.

Q. You have told these gentlemen here that you could not get any water at first in your first position, and that your second position was a still higher one? A. No, sir; we did not take a higher position; we were next to the roof.

Q. I will ask you if this jury shall find that the kitchen was three stories high and the main building four stories high when you took the second position, were you not higher than when you were in the first? A. I don't know whether the kitchen was three stories or four.

Q. I am not asking you for your opinion? A. We did not move the truck at all.

Q. Have you not just said that you did move the truck? A. No; I said we moved the ladder.

Q. The first extension of the ladder was to enable you to reach the top of the building that had three stories, or the kitchen? A. I don't know about the stories.

Q. And did you let down the ladder to get into the building the second time? A. Yes, sir.

Q. You did let it down, and yet you say you were on (447) the top floor? A. I don't know, sir; we were next to the roof of the building we were on.

Q. How long did you remain there in that position af-

ter you went into the room? A. Five or ten minutes—till the smoke got so bad we couldn't.

Q. Yes, the smoke was very dangerous; what did you do then? A. We went up on the aerial ladder and tried to throw the water in the windows.

Q. And you failed in that, then what did you do? A. Came around on South Elm street.

Q. When you were making an effort to throw the water into those windows you have just been testifying about, how many lines of hose were attached then to the different hydrants? A. I could not say.

Q. How many were attached to the Guilford Bank hydrant? A. There was but one here, that I know of..

Q. You say you don't know? A. I know only when I looked down there.

Q. I ask you again, how many lines were thrown out round there when you were trying to throw the water into those windows? A. I don't know, sir.

Q. And you say you could stand on the kitchen of the Benbow and see that hydrant at the Guilford Bank? A. I could see it from the building I was on.

Q. Well, you were on the kitchen? A. Part of the time on the kitchen and part of the time on the mansard roof.

Q. Is that not on the fourth floor? Did you have your hose up on the top of the building? A. No, sir.

Q. If you were up there, that would put you on top of the main building before you took your second position, wouldn't it? A. Yes, sir.

Q. How far east over that way did you go on that roof? A. I don't know how far.

Q. What were you doing up there, just simply walking about? A. No, sir.

(448) Q. Did you have any hose up there? A. No, sir.

RE-DIRECT EXAMINATION.

Q. After you changed the ladder from its position on the kitchen, you came over here up against the building so as to come in at the window right under the fire, did you? A. Yes, sir; right under the fire.

CARL WHEELER, for the plaintiff:

Q. You live in Greensboro, I believe? A. Yes, sir.

Q. You remember the fire that destroyed the Benbow House? A. Yes, sir.

Q. Were you there at that fire? A. Yes, sir.

Q. Was your attention called to it by the fire alarm? A. No; we had three buggies to hitch up and send to the

hotel at 12 o'clock, and we had hitched them up and the boys were getting into the buggies to take them there, and I saw the smoke coming out of the rear window on the fourth floor, this side of the kitchen.

Q. Did you see the first line of hose attatched? A. I did.

Q. Did you see the stream thrown by it? A. I did.

Q. How long was it? A. They ran the hook and ladder wagon up by the curbing and ran an aerial ladder up slanting that way, and I would say it came in eight or ten feet; the fire came up that mansard roof, and that was two and one-half, or three stories high and connected to the four-story building, and it caught in under the slate roof under the edge of it.

Q. And you say they tried to reach it there with the hose? A. Some of the boys went up on the ladder with a nozzle and the fire had burned through at the rear end on Sycamore street, and was burning up and down on the inside of the building and the water would not go in the window; struck six or eight feet from it and fell down on the outside.

(449) Q. That was the first hose attached? A. The Eagle Hose Company, that drives that big gray horse, and Fred Taylor was driving and had a connection near the Guilford Bank.

Q. Did you stay there? A. I ran up and told Mr. Mathews that the hotel was on fire and he and Mr. Dick were in there, and Mr. Wright came and they all ran up stairs and stayed there, and some one came in and said the hotel is on fire, and Mr. Hammer and myself ran up stairs and got to the fourth floor, and some one said turn on the water, and Mr. Hammer and myself were straightening the hose out; it was connected to the wall, and we straightened that hose and about that time, I think, Bob Douglas came and asked if they had water, and they said yes, and then Mr. Hammer said something about going for his trunk, and Mrs. Cator came in wringing her hands, and I told her not to be scared, and then I went down stairs.

Q. Then you went down and saw the hose on the outside; how many hours before you saw a stream thirty feet long; how long after the fire started? A. I just don't know. That's a hard question to answer. I would say anywhere from a half to three-fourths, or probably an hour, just about that, I think. Mayor Taylor and Chief Scott—

Q. Never mind, we won't go into what they said. Did you see, later in the evening, a stream thrown with the hose without engine pressure? A. I did.

Q. How far did they throw it? A. After the fire was

about over, and the colored company was left to watch, it brought round a line and could throw the water over the bar-room building into Dalton's.

Q. Did you see an attempt to put out the awning? A. Some falling timbers fell and caught the awning and some one turned on the water, standing near the edge of the curbing, and the water would not go on it, and some of the hook and ladder boys took a hook and pulled it down.

Q. How high was it? A. Ten or fifteen feet.

(450) CROSS EXAMINATION.

Q. At the time you saw the boys operating on the aerial ladder, that was after you had been up stairs where they were using the hotel hose? A. Yes, after they used the hotel hose.

Q. And after the Eagle Hose Company had taken their second position? A. I don't remember where the Eagle Hose Company went. I think they went in over the bar-room. I think they took the Eagle hose in at the front door and connected a line of hose from over at Dalton's.

Q. So, when they were using the water up on there it was from the Dalton hydrant, and not from the main line? A. I think so.

Q. When you saw that stream thrown over the building, there the fire was about put out? A. Yes, and the colored company just had one hose attached to the hydrant.

Q. Well, the engine broke down? A. Yes, sir.

Q. How long had the fire been burning when that situation there was photographed? A. I guess near half an hour.

Q. And this one when it was about out? A. Yes, sir; after the fourth story had fallen in and burned the third.

Q. How long had it been burning then? A. Close on to an hour I should say.

Q. It had been extinguished on top after that was taken all except where you see the smoke coming out? A. Yes, sir.

Q. That photograph indicates correctly the position of the hose there on the street, and so does this—the lines and position there in the street? A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. You spoke of these lines of hose out there, you don't know how many times they were doubled up? A. No, sir.

(451) W. T. SERGEANT, for the plaintiff:

Q. Do you remember the fire spoken of here that destroyed the Benbow House? A. Yes, sir.

Q. Did you hear the alarm? A. Yes, sir.

Q. How long after you heard it did you reach the scene? A. I started before the alarm was turned in.

Q. Did you see the first hose attached? A. Yes; in front of the Guilford Bank.

Q. Did you see the water when turned on? A. Yes; when it started out of the nozzle.

Q. What length of stream was thrown? A. I started from the depot (?) and saw the smoke and thought the building must be on fire, and the Eagle Hose Company came out and passed us, and had gotten to the plug at the Bank of Guilford and had the hose stretched round the corner and the water went to the middle of the sash on the second-story window, and then they shut the water off.

Q. They were trying to carry it how? A. They fixed a ladder and went up on the ladder; the aerial truck was there. I don't know what hose went up there.

Q. Did you see the stream that was thrown up on the kitchen? A. No, sir.

Q. When you saw it, it was after the ladder was moved, and they attempted to throw the water from the middle of the street? A. Yes, sir.

Q. Well, it twisted round this way and you could see them trying to throw it against the window side, and it would reach the sill and fall down on the ground.

Q. How far did it go from the end of the nozzle? A. I suppose seven or eight feet—the truck was close to the curb-stone.

Q. And they could not reach it from there? A. No, sir.

Q. Mr. Sergeant, how high would you say that building is from the ground to where the fire was? A. About forty feet, I expect.

(452) Q. Up to the fire in the main building? A. Yes, sir.

Q. Did you see a stream from the other hose? A. No, sir.

Q. Did you notice any other streams some time after that? A. After that, I saw water from different directions.

Q. State how long it was before there was a stream sufficient to reach the building at all? A. They were getting streams from the engine before it broke down.

Q. How long before they reached the fire? A. I don't know.

Q. They sent to Winston for an engine, didn't they? A. Yes, sir.

Q. It was a slow fire, was it? A. Yes; a slow fire.

Q. How long was it in burning? A. I suppose four or five hours, from beginning to finish.

Q. How many hours was it before you saw them reach it—before they had streams that would reach it without engine pressure? A. I did not really see them at all; they were shooting all about there from the engines.

Q. You have seen the fire before and after the fire? A. Yes, sir.

Q. What was the effect of that fire on the building? A. Burned everything away except the walls and the second story floors.

Q. Did you go about there after the fire was over—over the wreck? A. Yes, sir.

Q. Did you see later in the evening of the fire a stream of water thrown from the hydrant without engine pressure? A. No, sir; I don't know that I did.

CROSS EXAMINATION.

Q. Where were you when you were first attracted by the fire? A. Standing in the street near the depot. I was on the committee about letting the 'bus run.

Q. You don't know how long the fire had been burning? A. I was attracted by the smoke.

(453) Q. And as you came up the hose company passed you? A. Yes, sir.

Q. And they came on and attached to the hydrant at the Bank of Guilford? A. Yes, sir.

Q. Could you tell accurately about the location of the hydrant—now? A. I think it is a little to the south of the Guilford Bank.

Q. Is it not really in front of Shrier's shoe store? A. It's a little to the south of the bank.

Q. How far is it up to the center of Sycamore street from there? A. Two hundred feet, I should say.

Q. Banks Boon said it was one hundred and fifty. They came up the street and round the corner there and took their position there where the smoke was coming out of the building? A. Yes, and shot up the hose in that direction.

Q. How long did the water flow there? A. Only a few minutes—it would not reach and they cut it off.

Q. Did you see the fire coming out? A. Not at that time.

Q. When they were trying to throw the water there,

you did not see a blaze—they were trying to throw it where they saw the smoke? A. Yes, sir.

Q. And later they came in with this ladder? A. Yes, sir; the truck had run in.

Q. What is the size of the nozzles on the hose here? A. They are two and one-half inch nozzles.

Q. You say there was a line up here at the other corner—at Dalton's? A. Yes, sir.

Q. Well, two lines with two and one-half inch nozzles would be equal to one 5-inch? A. Equal to a 5-inch pipe?

Q. Two streams would be equal to one five-inch one, would it not? A. A five-inch diameter will carry more than two two and one-half-inch ones.

Q. I ask you if you have two lines of hose and each (454) nozzle is two and one-half inches, will not that make five inches? A. Yes, but it will not carry a five inch capacity of pipe.

Q. Were you on the board when these works were put in? A. No, sir.

Q. Do you know the size of the pipes on Greene street? A. I think they are four-inch pipes.

Q. Have you any information as to what would be the effect of attaching two hose to one hydrant, each being two and one-half inches, each being supplied by a four-inch pipe? A. It would reduce the pressure.

(Answered under objection. Excepted to by plaintiff.)

Q. Would it not destroy the effective force of it? A. It would not throw so high, or to any great height.

Q. Now, Mr. Sergeant, do you say the engine came and located at this hydrant at Gardner's Drug Store? A. Yes, sir.

Q. You are a mechanic, are you not? A. Yes, sir.

Q. You are familiar with this engine? A. Yes, sir.

Q. You have repaired it several times? A. Yes, sir.

Q. It has been down to your foundry several times and you have worked on it? A. Yes; I have fixed it.

Q. Did you see the stream from it? A. No, sir.

Q. Shortly after the fire broke out, the engine broke down and you and Mr. Lee repaired it? A. Mr. Lee was there when I got there; the air ..... came out.

Q. And you had to tie her down with rope? A. Anything that would cover up the hole that the air ..... came off of.

Q. Several minutes were consumed by that—probably half an hour? A. I suppose it was as much as twenty minutes.

Q. Do you know how many lines of hose were in use at any given time? A. No, sir.

Q. Do you know whether another line was run out (455) from the Bank of Guilford hydrant? A. No, sir; I never went down to that hydrant any more.

Q. Know how many were attached to these other hydrants? A. No, sir; I don't know.

Q. Streams were just shooting up all around there? A. Yes, sir.

Q. You said something about going into the building—the office was not burned at all, was it? A. No, sir; but everything was flooded with water.

Q. The second floor was preserved intact? A. It was not burned out.

Q Did you not save substantially half of the hotel that fronts on South Elm street? A. The lower floor was not hurt by fire.

Q. Did you not save substantially half of it without its being injured at all? A. No, sir; you mean half of the value of it?

Q. There was an old part to it on South Elm street and a new part; how many stores were in the new part? A. Three or four, I think.

Q. Royster had one, and there was Mrs. Howard's Book Store, and the telegraph office, and the millinery establishment? A. Yes, sir.

Q. No part of them was injured? A. Not by fire.

Q. The second floor was not burned? A. No, sir; the front part of it was not

Q. They used the office—kept things in there for a long time? A. I don't know, sir, as to what they had in there.

RE-DIRECT EXAMINATION.

Q What was the effect of that fire upon the building as to the building and its contents, and everything? A. The building was partly burned up and everything wet.

Q. What is the size of the main along South Elm street? A. A ten-inch pipe.

(456) Q Was that a single hose to the hydrant from which the water was first taken? A. Yes, sir.

Q. Where this other hydrant was situated on the corner, that was this side of the other as compared with the pumping station? A. Yes; to the right of the line.

Q. And branches off this way—state if a pressure from the pump as to water down this main would not give a pressure at that hydrant; would it not reach there before

it went down the main? A. No, sir; the pump would put a pulsation on every hydrant in Greensboro.

Q. Well, if this one had no pressure, the other one did not? A. No, sir; it may travel these other streets.

Q. State whether a hydrant located on a ten inch main would not throw a stream of water ten feet, would one on a four-inch main throw it further? A. No, sir; all under the same pressure.

CROSS EXAMINATION.

Q. I will ask you if the effective force with which water goes from the hydrants does not depend upon the height of it at the standpipe? A. Partly it does; it will increase a great deal when the pump is started up.

WILL SMOTHERS, for the plaintiff:

Q. Have you been sworn? A. Yes; yesterday.

Q. Were you at this fire when the Benbow was destroyed? A. Yes, sir.

Q. What time did you get there? A. Directly after the alarm sounded.

Q. Did you see the first hose attached? A. I did not see it attached, but saw the hook and ladder truck come up to Sycamore street. They attached in front of the Guilford Bank.

Q. Did you go up on this hook and ladder—on the aerial ladder? A. Yes, sir.

(457) Q. Describe how near you got to the fire and what the size of the fire was when you got there? A. When I got there, Mr. Stone he told me to go up and take a line of hose, and go on top the house. I went three stories, on the kitchen, and got there at the window sill and opened up the nozzle and the water came out six or eight feet—would not come any further than that.

Q. Did it ever get any stronger than that? A. Not up there—could not reach the window.

Q. How long did you stay there? A. About twenty or twenty-five minutes.

Q. What did you do? A. Could do nothing; had no pressure.

Q. Well, you came back down? A. Yes, sir.

Q. What did you do then? A. They moved the truck down just a little ways and some of the rest of the fellows tried to throw it in the window and it just fell against the side of the house; did not reach very far.

Q. How long did that condition of affairs exist after the fire started? A. It was half an hour or an hour.

Q. How long did you stay about the fire? A. All the evening.

Q. State whether or not you had a stream or flow sufficient to reach the fire without the engine pressure? A. No, sir; could not reach the second story from the ground.

Q. Did you see the water that was thrown from the hydrants late, about night? A. Yes, sir.

Q. State what was the length of the stream you saw then? A. I don't know—pretty good pressure then.

Q. Threw it up above the sills then, didn't you? A. I threw it and it fell over in the building.

Q. Threw it yourself? A. Yes, sir.

Q. What hydrant were you attached to? A. To the one in front of the Guilford Bank.

Q. One or two hose attached? A. One only.

(458) Q. Did you see the stream thrown by the colored hose late in the evening? A. No, sir; never noticed it.

Q. How many streams did you see at any one time during the day? A. I only seen (saw) two.

Q. State whether along Elm street, in front of the hotel there, any hose laying out there not attached to the hydrants? A. Some laying down there not in use.

CROSS EXAMINATION.

Q. Mr. Smoothers, you are one of the men who took this hose on top of the building? A. Yes, sir.

Q. And you threw the water six or eight feet? A. Not straight up—slanting up.

Q. You were throwing it at the fire above your head and you were standing up on top of the building? A. Yes; on the tin roof that runs down.

Q. Throwing against the mansard roof? A. Yes, sir.

Q. The fire was burning in that mansard roof when you got up there and popping the slate off? A. Yes, sir.

Q. Flames were bursting through? A. Yes, sir.

Q. You say later, when you had but one hose attached to the Guilford Bank hydrant, you had a good stream, when the fire was about extinguished? A. Yes, sir.

Q. You don't know yourself how many lines were laid out? A. Only know of two.

Q. And those were the ones you used yourself? A. I only used one of them.

Q. One at one time and one at another—you mean you did not use them both at the same time? A. Yes, sir.

Q. You don't mean to say there were none but those two there? A. No, sir.

Q. You only know of those two? A. Yes, sir

Q. Where were those two—one at the Guilford Bank? A. Yes, and the other at the Dalton hydrant.

(459) RE-DIRECT EXAMINATION.

Q. Was there more than one at the Dalton hydrant? A. No, sir.

Q. Did you see but one?

(Defendant objects. He says he does not know, and that's cross-examining him.)

Mr. W. R. LAND, for the plaintiff:

Q. Do you remember when the fire occurred at the Benbow House? A. About the time, sir.

Q. You saw the fire? A. Yes, sir.

Q. State to the jury, if you please, sir, what you did in connection with that fire, or said to any one in connection with it, in regard to the supply of water; state what you did and what time you did it, and how you did it? A. I was occupying an office in the Katz building, and saw the smoke in the rear end and the fire company soon responded to the alarm, and there was nothing I could do—seemed to be plenty of people there and appliances, and I took no part in it, except from the opposite side of the street, and after about half an hour I got alarmed about the fire on the opposite side of the street, and I went down to Fariss's Drug Store and called up the Water Company by 'phone and got a response.

(Defendant objects.)

Q. By the COURT: Do you know who it was talking over the 'phone? A. I could tell it was a feminine voice that responded.

(Defendant's objection overruled for the present.)

Q. Please state to his Honor and the jury if, after the fire had been raging for thirty minutes, and it was apparent that there was not a sufficient supply of water to extinguish the fire, whether or not you went to the telephone office and called up the engineer, or a party representing him, at the water station of the defendant company, and notified them, or enquired of them, why they did not put the pumps on as to enable them to reach the fire? A.
(460) Yes, sir.

Q. What was the reply?

(Defendant excepts to the ruling of the court.)

A. I could not tell whose voice it was.

Q. I will ask whether or not you called at the Central office? A. Yes, sir.

Q. And they notified you that you were connected with the water company? A. I got a response from the water station.

CROSS EXAMINATION.

Q. Did you know it was from the water station? A. The answer led me to believe it was from there.

Q. You don't know it was from there—it might have been the 'phone at my house? A. I believe it was from there; I could not swear who was talking, but the answer convinced me.

(Objection of defendant sustained. Plaintiff excepts.)

Q. State to his Honor and the jury what you saw at that fire; what was the condition of things, and what was the supply of water? A. To the best of my recollection, the hose was playing on the rear end and on the inside of the building; I did not go inside, or round to the rear end, and did not witness that part of the proceding.

Q. Go on and tell what you did? A. Later in the the evening they began to play from the east side, and then I could see what they were doing; they could not reach farther than the second story.

Q. Why? A. I can not tell why—it would not go higher than that.

Q. By the COURT: You just go on and tell all you know? A. They were attempting to throw the water on the building, or top of it, to put out the fire, but were unable to reach higher than the windows on South Elm street side; I think they had some hose on that side; later in the (461) evening, when the fire was supposed to be over, or extinguished, and the firemen had gone home, and a blaze broke out on the fourth story, and they sent some men with a hose and attached to the plug, and they were said to have thrown the water to the fourth story. What the conditions were I don't know, unless it was lack of water at one time and plenty at another.

Q. Mr. Land, did you at any time after the fire had been raging for some time in the building, have a conversation with a representative of the defendant company? A. I spoke to Mr. Wyrick.

Q. How long after? A. About half an hour.

Q. By the COURT: Is he the representative of the company? A. He looks after the business of the company in the way of collecting rents, etc.

Q. State the conversation you had with him? A. There

was considerable excitement about there and I asked Mr. Wyrick why he did not go and make them start up the pump, and he said he had been trying to get them to start, and I suppose he was trying to make them get the water up there.

Q. Why did you ask him to start the pump? A. I assumed he had some control of the water company, and there seemed to be a lack of water.

Q. Mr. Land, did you say how long it was, or at any time did you see a stream thrown from any hose, except those aided by the engine, that would reach to the third story, until the building was nearly destroyed? A. I don't remember seeing a stream thrown by the engine

Q. How long before you saw any stream that would reach it? A. That was late in the evening.

Q. It caught about 12 o'clock? A. Sometime in the afternoon—about 11 or 12 o'clock.

(462) CROSS EXAMINATION.

Q. Mr. Land, when you saw them throwing the water to the fourth story, that was after the fire had been extinguished and they had taken the hose away? A. Yes, sir; and I don't know but they had brought this hose back.

RE-DIRECT EXAMINATION.

Q. Mr. Land, you are a real estate agent and familiar with the town and the situation of the building? A. Yes, sir.

Q. State how many feet lower, if any, is the Benbow House below the level—the first floor of it—below the level of the Court-House Square? A. I should say that the sidewalk of the street at the south side is about five feet lower than the street at the Court-House Square.

Q. Do you know about how high the reservoir is? A. I only know what I have heard repeated as to its elevation.

CROSS EXAMINATION.

Q. You say it is five feet higher on South Elm street? A. Yes; measuring or leveling with my eye.

MR. KAUFFMAN, for the plaintiff.

Q. I believe you are the man whose name is identified with the awning which they could not reach over your door? A. Yes, sir.

Q. You had a store under the Benbow Hotel on the corner? A. Right on the corner.

Q. State whether you have any interest in this matter

or not, or any of the suits similar to this one? A. Only interested in my own stock of goods.

Q. Did you get insurance on your goods? A. Yes, sir.

Q. State, in your own way, when you saw this fire; what you did, and what you saw; how about the amount of water? A. About ten minutes after 12, I think, on (463) Saturday, I was in the store and saw a good many people going by and went out and looked and saw the smoke, and ran back and locked the door; my young man, who was with me, had gone to dinner, and by and by they had a line of hose there a stream of water, very muddy, and went but a very short distance. I went into the store again and my brother-in-law asked me, "What are you going to do?"

Q. Just tell what you did? A. I got my books together and sent for some of the insurance people.

Q. Well, that does not make any difference—tell about the stream of water you saw there? A. After I saw the small stream there, I went and stayed in the store awhile and came out again, and waited for them to tell me what to do.

Q. When you came out later on, did you see the different streams? A. I never saw but one stream, until I saw the one on the side.

Q. What time did you leave the store? A. Twenty minutes to one, we commenced moving the goods.

Q. How long was this other stream you saw? A. I cannot tell you that; it was not very long, probably from here to about the end of that railing over there.

CROSS EXAMINATION.

Q. Do you know who had hold of that hose? A. Indeed I do not.

Q. The water was coming out of it? A. Yes, sir.

Q. And if you had had enough of it, it would have put out an ordinary fire? A. Yes, sir; any water will put out fire.

Q. There has been a great deal of talk here about that sign—where is it? A. Over my store.

Q. So the thing was not burned? A. No; but the awning was; on top is a place about that long where it was burned.

(464) Q. The sign was saved and the awning, made of cloth, was burned off? A. The awning was burned and the edges of the sign were burned.

Q. You don't know who it was trying to save it? A. No, sir.

Q. You were looking after your goods? A. Yes, sir.

C. G. WRIGHT, for the plaintiff:

Q. Mr. Wright, did you see the fire that burned the Benbow? A. Yes, sir.

Q. What time did you get there? A. Twenty minutes after twelve.

Q. Did you see the first line of hose laid? A. The first I saw was on Sycamore street. I think it was connected with the plug between Hinkle's Millinery Store and Shier's shoe store, and they took it up on the ladder from the hook and ladder truck that turns by a crank.

Q. How long did you stay there? A. From the time it started till about 4 or 5 o'clock.

Q. About what kind of streams did you see there? A. The first I saw on this wagon and c[illegible] the hook and ladder truck by means of a crank, and i[illegible]as passed up by one of the firemen trying to throw it into the fourth story, and it hardly reached the third. After that I came down and went into the hotel, and there was so much confusion I could hardly tell how the water was there. Afterwards water was thrown from the corner and reached to the second or third floors—the corner near Kauffman's store. The only streams I can remember going any distance were those thrown by the two engines from Winston.

Q About how long after the fire got started before these engines went to work? A. It was probably half past two when they came.

Q. State whether or not, prior to that time, the streams were sufficiently long to reach the fire from parties holding the hose on the ground? A. The fire was in (465) the fourth story and the water would not go to the third.

CROSS EXAMINATION.

Q. You don't know how many streams they had had in action do you? A. The first I saw, I understood, was the first stream.

Q. I want to know what you saw, not what you heard? A. I saw where there was one in the rear of the hotel.

Q. And in the meantime the colored people had connected with the Market hydrant? A. I don't know that.

Q. So as a matter of fact, you don't know how many were being run at any given time of your own knowledge? A. From the time the fire first broke out, till I saw them, I think they were the first.

Q. You are reasoning now, Mr. Wright; I want the

facts you know? A. Well, I could not tell how many streams there were.

RE-DIRECT EXAMINATION.

Q. You were out there where you could see? A. I only know the water I saw reached to the third story, and no further, sir.

Plaintiff introduces the contract between the city and the Water Company, which purports to be attached to the complaint.

WILL JONES, for the plaintiff:

Q. Are you connected with the Fire Department? A. I am president of the Colored Reel Company.

Q. Were you at that fire, and if so, go on and tell all about it? A. I was standing outside the market and I saw the smoke coming out from over the kitchen, a great deal of it, and my horse was standing there, and I have the (466) hose in my care and I carried it up there and connected with the hydrant at the Benbow Hotel.

Q. How many feet of hose did you put out? A. There is 50 feet to section—600 feet on our reel.

Q. How many nozzles did you use? A. One nozzle.

Q. Did you go up stairs with that? A. Yes, sir. After we got to the third floor somebody called to turn on the water, but it would not go any further than from here to that table, and there was getting to be so much smoke could not throw the water.

Q. What success did you have in putting out the fire? A. None; because the water would not come out. It was not strong enough to fight it.

Q. After you went down stairs, what did you do? A. Chief Phipps ordered us out, and we began to throw on the outside and just did reach to the top of the Benbow House, and that is about what we done; could not fight it inside, because of the smoke.

Q. Who was left there over night to look after the building and guard the embers? A. My company stayed there. I did not. I was there till about 11 or 12 o'clock.

Q. Did you use the hose any? A. We threw water all night near about.

Q. How many hose did you have attached that night? A. I suppose about six.

Q. How many to any one hydrant? A. Two.

Q. How high could you throw it? A. To the top of the house.

Q. From the same hydrant with two hose attached? A. Yes, sir; just about on top.

CROSS EXAMINATION.

Q. Your company was in charge of the reel? A. I am president, yes, sir.

(467) Q. In proper condition you have about six hundred feet on it? A. Yes, sir.

Q. When you go to a fire, you determine what hydrant you are going to attach to and a certain man takes hold of the but of the hose and makes the connection and unreels the six hundred feet of hose? A. Yes, sir.

Q. And you unreeled that and went up stairs with the hose? A. I could not say we unreeled all of it.

Q. You don't have the different sections connected? A. All together, yes, sir.

Q. Did you stop in the midst of that fire there to disconnect them? A. Sometimes we do.

Q. I am not talking about sometimes; what did you do at that fire? A. I don't really know now, but we went up stairs and turned on the water. I gave him notice and when he turned on the water it went about as far as from here to that "banister."

Q. You were on the third floor? A. Yes, sir.

Q. Did you fight it up over your head? A. Hose up all round there.

Q. We will get down to the night—there were two lines attached to that one hydrant there? A. Yes, sir.

Q. The fire to be gotten under control was within or chiefly on the second floor? A. I don't remember exactly what floor. I know Chief Phipps ordered us to stay there that night.

Q. Did not the fourth and the third and the main burn out, and all that fall on the second floor? A. On the second and some on the other; burned there more than anywere else.

Q. The kitchen was only three stories high? A. I don't remember how many. I don't know.

Q. What you were there to do that night was to put out those smouldering embers, and it was chiefly on the second (468) floor? A. Yes, sir. I don't know exactly what floor it was on; it would break out here and sometimes over there.

Q. I ask you if the whole top had not fallen in that evening? A. Yes; except on the right towards the brick store?

CAPT. FISHER, plaintiff in the action, testified:

Q. You were the owner of the Benbow House spoken of here? A. Yes, sir.

Q. Where did you live at that time? A. At Ashboro.

Q. Were you here on the occasion of the fire? A. No, sir.

Q. When had you been here? A. I left that morning.

Q. When did you return? A. The fire was on Saturday and I think I returned on the next Monday.

Q. What was the condition of it when you returned? A. I looked upon it as practically ruined.

Q. Well, just describe the condition of it? A. The whole of one end was destroyed and up as far as Royster's store I should think completely, and the other part was pretty badly damaged with water.

Q State about the top timbers—above there had they fallen down? A. Had not fallen down north of Royster's store, but had, as far as I can remember, all other places.

Q. What was the condition of this house at the time of the fire? A. It was all right.

Q. State something about the office there and the decorations all through the house as to class and character? A. All, I should think, more especially the office and dining-room, of the very highest class, I should think.

Q. What was the effect upon the frescoing? A. It was ruined, as far as I could see.

Q. Capt. Fisher, what was that hotel worth just prior to the fire? A. I considered it as worth about $85,000; that and the land together.

(469) Q. How much were you damaged by said fire? A. I considered myself almost entirely damaged.

Q. Well, just how much in dollars and cents? A. To the extent of about, probably $22,000; of all that was left, according to the notes I made, I would say I was damaged to the amount of $22,000.

Q. How much did the hotel cost you in dollars and cents? A. $85,000—up to that.

Q. You bought it of Dr. Benbow? A. Yes, sir?

Q. How much did you pay for it before improving it? A. $55,000.

Q. And the improvements ran it up to $85,000? A. Yes, sir; and the increase in the value of the land.

Q. You sold it, I believe. A. Yes, sir.

Q. To whom? A. Mr. Merrimon.

Q. How much did you get for it? A. $30,000.

Q. How much, Capt. Fisher, was the land at the time you sold it, how much would you estimate it to be worth?

A. It was valued for the sake of another party who desired to buy it—the appraisers.

Q. What would you say it was worth? A. I should say $150 a front foot.

Q. How many feet are there? A. I think about 147 1-2, or 149, I can not remember which.

Q. That aggregates between $22,000 and $23,000? A. Yes, sir.

Q. Capt. Fisher, did you have any insurance upon that property? A. No; not at that time.

Q. Did you ever receive any reimbursement for the loss? A. No, sir.

Q. The difference between $30,000 and what it cost you is what you lost? A. Yes, sir.

Q. Captain, at the time you bought the property from Dr. Benbow, state whether or not this private hose was in there? A. Not prior to my getting the house.

(470) Q. Afterwards you had it put in there? A. Yes, sir.

Q. Who did you make arrangements with to have it put in? A. I can not remember exactly to whom I went. I know I took the ordinary proper course that was required by anybody to connect with the main.

Q. Well, you arranged with the water company? A. Yes; with the water company.

Q. Just describe your understandings and agreement? A. (No answer.)

Q. How long had it been in before the fire? A. I cannot tell you.

Q. How long had you owned the hotel? A. Since '92; I think we got it some time in '94, but cannot remember.

Q. Did you pay the defendant water company for furnishing the hotel with water? A. Yes, sir; I paid them every month.

Q. How much, Captain? A. I don't think it was ever less than $22.00 a month; very often over that—very often disputed about it. I know it went over $22.00, sometimes $28.00.

Q. How many plugs did you have. A. One on the second and one on the third floor.

Q. You say they were attached to the main at the hotel? A. A separate connection.

Q. State whether or not they were put there by agreement and consent of the water company?

(Defendant objects. The present company was not in existence in '94. Objection sustained.)

CROSS EXAMINATION BY MR. KING.

Q. Capt. Fisher, you say you were residing in Ashboro at the time of the fire? A. Yes, sir.

Q. Where did you vote? A. Do what?

Q. Where did you register and vote at? A. I voted in Ashboro.

(471) Q. How many times?

(Plaintiff objects.)

Q. Are you a naturalized citizen? A. No; I did not say I registered there.

Q. I will ask you again where you registered and voted in North Carolinia? A. I never remember to have ever registered in Ashboro.

Q. Did you ever register and vote in North Carolina? A. I never registered; I voted in Ashboro.

Q. Then you voted without registering, and you are a foreign citizen? A. Yes, sir.

Q. Well, they notified you of this fire? A. Yes, sir.

Q. What was your reply? A. I don't think I replied.

Q. Did you say, "Let her burn and go to h—l, or burn and be d—d? A. Never in this wide world. I did not.

Q. You know it was reported round here that you said something like that? A. No; I don't know.

Q. Did you take the water and pay for it by the gross amount, or take it by meter? A At one period by the gross and then later took it by meter.

Q. When did you commence taking it by meter—how long prior to this fire? A. I cannot tell.

Q. Well, approximately? A. I cannot tell.

Q. Prior to the fire you had been paying by the gross and were paying by the meter at that time? A. I think so, Mr. Morton can tell you.

Q. The water was used for what purposes? A. The various purposes of the hotel.

Q I will ask you if this pipe was in any way connected with, or effected by, the meter? A. No; it was independent.

Q. So you were only paying for what you got through the meter? A. Yes; we were not to use this pipe, except in case of fire.

Q. There is no doubt about that? A. No, sir; no doubt.

(472) Q. I ask you if you did not tap that pipe and run water into the barber shop? A. No; not to my knowledge.

Q. Have you not seen it? A. Never, absolutely.

Q. Did you not arrange with Mr. Albright to—? A. No, no, indeed; never arranged anything with him.

Q. You don't know your representative had it done? A. No, sir; I was not to use that, because I was not paying for it, except in cases of fire.

Q. You knew that Wood, the barber, was getting water? A. Yes; I supplied him.

Q. And the water he got came through your meter? A. So I believe, or some alteration was made that I was not aware of.

Q. He was getting it for basins and for running fly fans? A. No, sir; I allowed him to have it free of cost.

Q. You are talking about the value of that property—you paid Dr. Benbow $55,000? A. Yes, sir.

Q. And that included the furniture? A. Yes, sir.

Q. In other words, Dr. Benbow was operating a hotel there and you bought it and came in and ran it on? A. Yes, sir.

Q. I will ask you if the improvements you made did not consist in the main in fitting up the office and the bar-room? A. And the dining room also.

Q. How much did the office cost you? A. I could not tell.

Q. What did the dining-room cost? A. It would be impossible for me to give you that.

Q. What did the bar-room cost you? A. I don't know. I did not keep separate accounts of them. Mr. Hackett did that. I told him how much I would spend and he did it.

Q. The bar-room was fixed up handsomely and was the nicest room about the hotel? A. No; I don't think so.

Q. The bar-room was saved, wasn't it? A. I think so.

Q. And all of its contents? A. Yes, sir.

(473) Q. I will ask you if the office was not in the main saved? A. I don't know what you call saved—everything was ruined.

Q. How about the floor? A. It was all right.

Q. And these pillars up here? A. The walls were intact.

Q. And the arches? A. They were there.

Q. And the overhead ceiling was all right? A. No; it was not.

Q. Did you not spend quite a time in there after the fire and invite in your friends and have social gatherings in there? A. Nothing of that at all—not that I'm aware of. If I ever did, it was just casually once or twice.

Q. I will ask you about the carpets. Did you not have some old carpets in use there that you got from Benbow? A. A very large number of carpets were bought.

Q. Did you carpet the hall of the first floor anew? A. Those were fresh, yes.

Q. And the second, out and out? A. I think they were.

Q. Rooms and all? A. Not all of the rooms.

Q. Were all on the first floor carpeted anew? A. No; I don't think so.

Q. And that may be said of the second and third? A. The second is the principal floor. The whole of the halls, and possibly some of the rooms, where the carpets were, in bad fix. I don't know how much was done up stairs.

Q. You don't know how much was done in the office, or bar-room either, do you? A. The reason is this, there were certain amounts to be spent in the office and bar-room, and I have never kept separate accounts; they have never been sub-divided.

Q. You say you expended $30,000 in improvements after you got it from Benbow? A. About $23,250.

Q. So then you had expended with the first price paid for it $78,000 in round numbers? A. Something of that (474) sort. You know I said it was worth $85,000, and that balance is made up of the increase in the value of land.

Q. Well, the land is there isn't it? A. Yes.

Q. It did not burn that up? A. No, sir

Q. Well, you sold it to Mr. Merriman for $30,000? A. Yes.

Q. Capt. Fisher, I will ask you if all the walls—outside walls—were not left intact? A. I could not say; my opinion was at the time—

Q. Well, I want to know the conditions? A. They were there.

Q. Never have been burned down to this day? A. Not that I know of.

Q. The hotel was built back on those very walls and that is so as to the outer walls all round? A. I don't know of any being torn down, except some off the top floors.

Q. How long after the fire did you come up? A. The fire was on Saturday and I think I came here Monday.

RE-DIRECT EXAMINATION.

Q. What was the hotel furniture worth outside of the carpets? A. I could not tell what it was worth independent of the carpets.

RE-CROSS EXAMINATION.

Q. You saved a large quantity of the furniture? A. You know I did not save anything. It was taken out.

Q. You sold to Mr. Merrimon and he got the furniture? A. Yes, sir.

Q. Did you sell, independent of your sale to Merrimon, any furniture? A. I sold him all of it.

Q. Independent? A. No; it was included in the sale.

Q. The $30,000 covered everything that was saved? A. Yes, sir.

Q. Didn't you reserve a little that did not go to Merrimon? A. No, sir.

(475) Q. Did Merrimon get the bar fixtures? A. Yes, sir.

Q. Did he get the liquor, too? A. No; I kept the liquor.

RE-DIRECT EXAMINATION.

Q. They asked if you were not a foreigner; you enjoy the distinction, or the disgrace, whichever it is, of coming from the Mother Country? A. Yes, sir.

Q. You are an Englishman? A. No; I'm a Scotchman.

Q. How long have you been here? A. Since 1885.

Q. How long since you came to North Carolina and invested your money in Greensboro? A. In '87, I think.

Q. Are you a property owner in the city of Greensboro? A. Yes, sir.

Q. How much tax do you pay to the city government?

(Defendant objects.)

Q. Captain, you are not very familiar with the laws of this country, are you?

(Defendant objects.)

Q. What kind of an election did you vote at, do you remember? A. I voted at the Presidential election.

RE-CROSS EXAMINATION.

Q. Where do you reside now? A. In New York.

RE-RE-DIRECT EXAMINATION.

Q. Was all the furniture included in the sale to Mr. Merrimon? A. Yes sir.

Plaintiff rests.

CAPT. H. L. FRY, for the defendant:

Q. Did you ever measure the height of the water tower down yonder? A. Yes, sir.

Q. Taking the center of the street out there as your

base or bench line, how high is the brick structure? A. (476) The bottom on the brick structure is 11 feet 8 inches above the court-house square at the ground. At the top or rather at the bottom of the tank it is 72 feet 7 inches above the center of the square, and then to the top of the tank it is 98 feet 1 1-8 inches.

Q. Do you know how far the brick structure goes into the ground? A. No, sir; I do not.

Q. Do you know how much the tank holds? A. No, sir.

CROSS EXAMINATION.

Q. Captain Fry, the top of the tank is 100 feet from the level of the court-house square? A. No, sir.

Q. Do you know how near the top the tank will hold water? A. I do not, sir.

Q. Do you know, Captain, the construction and operation of this plant here, as to how it is operated? A. No, sir; I do not.

Q. Do you know whether or not there is a gate at the bottom of this tank? A. No, sir.

Q. You know nothing of the pumping station? A. I have seen it—know nothing about the working of it.

Q. Are you acquainted with the different kinds of hydrants? A. No, sir; not intimately.

Q. How much lower would you say it is—or was at the time of the fire—between the bench mark here at the level of the court-house square and the sidewalk of the street on the lower end of the Benbow? A. I should say that was about 4 feet lower than at the center of the square.

Q. Captain, if the tank had been full at the time of the fire, referred to, how high above the surface of the ground at the Benbow, in feet, would the top level of the water level be? A. One hundred and two feet—between that and 103.

Q I believe it is agreed that water will seek its level? A. I think so.

Q. Are you familiar enough with it to state what (477) length of stream a column of water 102 feet would throw through an ordinary hose 200 feet long? A. I have never seen it tried, sir.

Q. Do you know how deep the tank is? A. About twenty-five feet.

Q. Is it quite twenty-five? A. Twenty-five and a half is the measurement I have from the bottom to the top.

Q. How far, Captain, was the water tower situated from the Benbow hotel at the time of this fire? A. I should say about one thousand, eight hundred feet. I have never measured it.

Q. State whether or not the hydrants along by the Benbow from which water was taken for this fire are situated on the main line of pipe that leads from the water station? A. I am unable to say.

RE-DIRECT EXAMINATION.

Q. About the difference in the altitude at the lover end of the hotel and the square, have you made the measurement? A. In making the first measurement, I took the elevation of South Elm and Sycamore streets, and that is about five and a half feet lower at the N. E. corner of South Elm and Sycamore, and I think there is a difference of about one foot on the sidewalks of each side.

Q. Which is the higher, on South Elm or West Sycamore? A. I should say on Sycamore it is higher—it lescends towards Elm street.

Mr. THACKER, for the defendant:

Q. Were you up in the Benbow the day of the fire? A. Yes, sir.

Q. Just go on and state to his Honor and these gentlemen of the jury where you were when you heard the alarm, if you did hear it, and what you did, and the length of time probably consumed in doing what you did? A. (478) When the alarm sounded I was going in the Benbow House, and I went up the steps, and they had one line of hose up the third flight of steps and in the door in the hallway of the fourth floor, and were straightening the hose out, and asked them to turn on the water, and they did, and it failed to come, and some one straightened the kinks out, and we had a pressure then; but before we got to that, some one kicked open a door over the fire and we could see the fire plainly; and it threw a stream, the best I can remember, about ten feet, and after we had worked on that a little while, and at that time the fire was burning through the wainscoting and the little trap door at the back of the hall, and suppose the fire was four or five feet to the right of the hall and to the left fifteen or eighteen feet, burning over that space, and further than I could reach with the hose.

Q. Burning on either side of the door? A. Yes, sir.

Q. And when the water came you say it gave you a stream of about ten feet? About that.

Q. You were then close to the fire? A. I got down right in the door way where the fire was burning.

Q. How many minutes did you have this 10-foot pressure? A. It is hard to tell how time goes—three or four minutes.

Q. Something intervened? A. From some cause the pressure was cut down to about five feet.

Q. How long did that last? A. When I left, and I was the last man to leave, I had put out the fire in my reach, except, it was a little too hot to get in that hole; but I did put it all out where I could reach.

Q. And you finally abandoned it, and they had a 5-foot stream when you left? A. Yes, sir.

Q. Where did you go then? A. I came out down the stairs, and I think I met one line coming up one of the first landings. I wanted to go in but the smoke was too strong, and they carried that line out close to the bar-room.

(479) Q. Made an attempt to get into the fourth story? A. Yes, sir.

Q. They retired, did they, from that floor? A. Yes, sir; and went out on the building outside.

Q. I will ask you if in order to get out there where they got, did you not have to go back to the second story? A. I think they did—am not positive. I went to the bar-room building, and then came right back.

Q. You helped to take the hose out? A. Yes, sir.

Q. Do you know who was at the nozzle? A. No, sir.

Q. Where did they next go? A. I don't know, sir; I went outside.

Q. How much time had been consumed from the time you retired from the fourth floor before you came back off of the bar-room building? A. I don't know when they came off. I know when they went on it.

Q. How long approximately before you came back? A. Five or six minutes—not long.

Q. You left them on the bar-room? A. Yes, sir; and I came out in front. I left them out there with the line of hose.

Q. What were they doing? A. Nothing, when I left them.

Q. Do you know how many feet of hose were in that line? A. No, sir; I don't know where it was attached.

Q. Do you know who had hold of it? A. No, sir; I don't remember.

Q. How did you get out on the bar-room there? A. Went out the window, close to one of the stair ways.

Q. And this line of hose was attached to this line of pipe on the second floor—the hotel hose? A. Yes; on the second floor.

Q. You go up the steps from the front, and they wind round this way and finally land you in an open space on the second floor? A. Yes, sir.

(480) Q. So, after landing, you turned west from where the hose came from? A. Yes; in the north hall.

Q. How far back down the hall from the landing was it to where it was? A. I would say it was eighteen or twenty feet from the landing of the stairway.

Q. So you went up two flights of steps, and west down the hall way eighteen or twenty feet? A. Yes, sir.

Q. What was the size of the pipe there do you know? A. I don't remember.

Q. Know the size of the nozzle? A. It was a small one—I would say about five-eights—could not have been over one-half inch.

Q. What was the size of the hose? A. I don't recollect.

Q. Did the engine break down? A. Yes, sir.

Q. When did it break down? A. I don't know.

Q. Did you see any stream from the engine before it broke? A. No, sir; I was not in a position to see it.

Q. Do you know how many lines of hose were attached on the Benbow corner? A. I think there was one line.

Q. How many lines of hose in all were laid out there? A. When I came out of the building there was a line from the Eagle Hose Company attached in front of Hinkle's store.

Q. Is that hydrant there not further south than the Bank of Guilford building? A. It is 3 feet this side of Shrier's shoe store corner.

Q. Have you made the measurement? A. Yes; I stepped it off there to-day. It is three feet to the sidewalk and 210 feet to the curbing at the Benbow corner.

Q. What is the width of Sycamore street? A. Ten feet, I should say. As to the number of feet the Eagle Hose Company carried, I know how many they left in the wagon. I went to get another line to attach to the plug on West Market street, and found two sections on the (481) wagon, and they carry most all the time ten sections. Fifty feet to a section—500 feet.

Q. That gave them a line of 400 feet? A. Yes, sir.

Q. You observed that line laid out? A. Yes, sir.

Q. And in operation? A. At the time I first saw it I think they were changing the position—the stream was cut off.

Q. Do you know the first position they took after the change? A. I don't know that I do. I think I came up this way towards the corner, and got some hose and went back between Mrs. Gorrell's and the laundry.

Q. Are you a member of the Eagles? A. Yes, sir.

Q. And they carry the hose? A. Yes, sir.

Q. And you got some hose from the steamer wagon and went to the corner of West Market and Greene streets? A. May have had some off of two wagons.

Q. To what point did you go? A. Back of the laundry and Mrs. Gorrell's—we got that round and I came back to the front end.

Q How many feet were in that line? A. I don't know.

Q. From your knowledge of the distance what would you say? A. Three or three hundred and fifty feet.

Q. It would have to cross West Market street? A. Yes, sir; I think it was laid strait. I knew we were scarce of hose, and put it straight.

Q. And you would say there were three or three hundred and fifty feet? A. Yes, sir; we then assisted the Eagle Hose Company which had come to the front—could not reach it in front, and had that nozzle shut off.

Q. How much time had been consumed from the time of the alarm to the time you got this hose laid out there and got back to the hotel? A. Forty or forty-five minutes.

Q. Where was the line the Chief told you to cut off? A. I will not be positive whether we had the nozzle from the corner plug or from the Guilford Bank.

(482) Q. How many lines were laid from the Dalton plug? A. I did not see that until after the Salem engine came.

Q. How long after the alarm was turned in before it came? A. I suppose two and a half hours.

Q. Do you know where the colored company attached? A. I could not be positive.

Q. Was there a line from the plug near the market about Thomas' store? A. I don't remember.

Q. How many lines from the plug near the drug store—Gardner's? A. I saw one line.

Q. Any others after that? A. I don't know about that.

Q. And the Chief told you to cut that one off? A. Yes, said we could do no good with that stream

Q. The fire was burning where at that time? A. Under the mansard roof.

Q. At the top of the third story? A. About the top of the brick wall.

Q. How far could you reach then, Mr. Thacker? A. We could not reach the fire—we helped to get the hose on the ladder on South Elm street.

Q. You could not reach it in the mansard roof you say? A. No, sir.

Q. How far could you reach? A. I think we could reach the second story.

Q. Nothing higher than that? A. No, sir. With the extension of the ladder it would go six or eight feet from the top of the ladder—ladder in the middle of the street—not sufficient to reach the fire.

Q. Do you know, as a matter of fact, how many lines were playing on that fire from different parts at that time? A. No, sir. I know how many were attached, but not how many were playing. There were five attached at one time.

Q. Where were they? A. One at West Market, one at the corner of the drug store, two at the Guilford Bank and on at the corner of the Benbow—5.

(483) Q. Do you not know, as a matter of fact, that they were playing from the beginning of the fire or soon thereafter? A. Not from my own knowledge.

Q. Frank Dalton's building had to be protected? A. Yes, sir.

Q. And Dr. Benbow's? A. Yes.

Q. And those buildings across the street? A. Yes; one line was taken on Mr. Dalton's building, and used up there.

Q. What line was that? A. I think one the South-Side or the Eagles carried round afterwards—might have been the South-Side or the Eagles, or this line I held when in front—am not positive.

Q. When you were round there trying with your ladder in the front street, you don't know how many nozzles were at work then? A. No, sir.

CROSS EXAMINATION.

Q. You are a member of the fire department? A. Yes, sir.

Q. You have a good system? A. Fairly good.

Q. Well, you win prizes and carry the Champion belt? A. Sometimes we do.

Q. How many companies have you? A. Five.

Q. All out there that day? A. Everything was out in full force.

Q. And everyone was doing everything they could? A. Supposed to be.

Q. All at work? A. Yes, sir.

Q. How far is it from these buildings on Market street to the hydrant in front of the Guilford Bank? How many hundred feet? A. I should say 800 feet.

Q. Well, after you saw you could not reach it up here you went round to a small house where you could reach? A. I said we went round and were playing on it from there—Mr. Elam and Mr. Smothers were working that line.

(484) Q. You said the hose used at Dr. Benbow's was a private hose did you not? A. No, I did not say that.

Q. How high was the ladder on South Elm street? A. The first ladder was straight, the next I suppose, went half of the way.

Q. And they could not reach higher than the second story? A. Six feet from the end of the wagon.

Mr. ALBRIGHT, for the defendant:

Q. Where do you live, Mr. Albright? A. In Greensboro, up to two weeks ago.

Q. What is your business? A. I am a plumber.

Q. Who did you use to work with? A. The Odell Hardware Company.

Q. Do you remember to have ever done any work for Captain Fisher? A. Yes; repeatedly.

Q. Did you do any work in connection with affording water for the Benbow House? A. Yes, sir.

Q. From what source did you get that water?

(Plaintiff objects. Sustained. Defendant excepts.)

Q. At whose instance did you do that work? A. Woods.

Q. Have any conversation with Fisher about it? A. No, sir.

Q. Or Mr. Morton? A. No, sir.

Q. Did you have conversation with any representative of Captain Fisher? A. He was reported to be his representative.

Q. You made this connection with the pipe and ran it into Wood's barbershop—for what purpose? A. For basins and a water motor.

Q. What was the use of the water motor? A. Running two fly fans.

Q. How long before the fire did you make that connection? A. About twenty-four hours before the fire—from 3 o'clock the day before until the fire occurred at 12.

(485) Q. Were you here on the day of the fire? A. Yes, sir.

Q. Hear the fire alarm? A. Yes, sir.

Q. Where were you when you heard the alarm? A. In front of the hotel.

Q. State if during the progress of the fire you went on the water tank? A. Yes, sir.

Q. How long after the alarm? A. I should say fifteen or twenty minutes after the alarm.

Q. At whose instance did you go? A. To the best of my recollection, J. S. Hunter and E. P. Wharton were standing together, and Mr. Hunter asked me to go—he was a member of the Board of Aldermen.

Q. Now, just state what was the condition you found things in down there?

(Plaintiff objects. Overruled. Exception.)

A. I climbed to the top—the water level was 3 feet 9 inches from the top of the wooden cover on the tank—3 feet 9 inches.

Q. Did you measure the depth of the water? A. No, sir.

Q. Do you know the depth of the tank? A. Only know what it is reported to be.

Q. In fifteen or twenty minutes after the alarm you made this measurement, and the water was within 3 feet 9 inches of the top? A. As near as I could judge.

Q. What did you then do? A. I came down and returned to the hotel.

Q. Did you make a report of what you found? A. Yes, to Mr. Wharton.

Q. Did the Water Company have anything to do with that examination? A. No, sir.

Q. Did they know—the company—when you made it? A. Not at the time.

Q. And subsequently they found it out? A. Yes, sir.

(486) CROSS EXAMINATION.

Q. Mr. Albright, the reason you went up there was because they were not getting any water down here, and they wanted you to go and see what was the matter? A. That is only supposition—I went as a citizen.

Q. You say the water was in 3 feet of the top? A. It was 3 feet 9 inches from the top of the tank to the water, making it lack only—

Q. Where were you when you were asked to go? A. I was standing in front of the hotel.

Q. Before that time a stream had been turned on down below there? A. Not to my knowledge.

Q. Are you positive as to how long it was? (Before he went to the tank.) A. I saw the smoke and heard the alarm as I arrived at the hotel, and started back towards the front of the building, and met Mr. Wharton and Mr. Hunter, and was asked to go and see how much water was in the tank.

Q. Did you tap this water main in the hotel there? A. Yes, sir.

Q. Did the Water Company know you did it? A. It had not been reported to them—we had permission to make taps and report them afterwards.

Q. It had been turned on and 24 hours afterwards you

reported that you had finished it? A. We had permission to make connections inside of buildings and report them afterwards. In the street we had to report them first.

Q. You reported this to them? A. No; it had not been reported—the report was made out, but had not been handed in.

Q. How large was the pipe that came out there? A. There were three half-inch pipes connected into one 3-4-inch pipe. The main pipe was 3-4 of an inch inside diameter.

(487) S. B. KERSEY, for the defendant:

Q. Where do you live? A. On the corner of Ashe and Bragg streets.

Q. How long been living there? A. All my life.

Q. Remember the occasion of this fire? A. Yes, sir.

Q. Did you hear the fire alarm when it was turned in? A. Yes, sir.

Q. Where were you? A. On the corner of Ashe and Lee streets.

Q. Tell the neighborhood—these gentlemen don't know the streets? A. There at the old Harvey place, not far from Glascock's foundry.

Q. How far? A. One hundred and fifty to two hundred yards.

Q. What did you do? A. I came to the fire as quick as I could.

Q. How long after arriving at the fire or getting close there—did you go back south again? A. Yes, sir.

Q. How long would you say it was before you went back, after the alarm was turned in? A. I suppose about an hour and a quarter.

Q. At whose instance was it you turned back south? A. Mr. Mendenhall's—he asked me to go and see how much water was in the tank.

Q. What did you find? A. It lacked about eighteen or twenty inches of being full.

Q. What did you do when you came down? A. I came back and reported to Mr. Mendenhall, and to you also.

Q. You reported to me? A. Yes, sir.

Q. You went at my instance, did you not? A. Yes, sir; you asked Mr. Mendenhall to appoint some man to go, and he asked me would I go, and I went. It was 25 minutes to 2 when I came down.

Q. Anyone go with you? A. No, sir; there were several at the bottom.

(488) Q. Did you tell them how it was? A. I told them it was in eighteen or twenty inches of the top.

Q. Could they see it? A. They could see it was running out at the top—it was leaking.

CROSS EXAMINATION.

Q. What Mendenhall was that? A. Mr. Will Mendenhall, manager of the Guilford Lumber Company.

Q. That man over there on the jury? A. Yes, sir.

Q. Mr. King was with you? A. Yes. Some one was talking to him, and he said, "I wish you would appoint a man to go up there," to Mr. Mendenhall, and he asked me would I go.

Q. In Mr. King's presence? A. Yes, sir.

Q. Mr. Kersey, I ask you if the reason Mr. Mendenhall asked you to, and the reason you did go, was not because you were not getting enough water to reach the hotel? A. Yes; I would say so.

Q. And that was the condition between an hour and an hour and a half after the fire started? A. It was so till I left.

Q. And these parties went to him and complained because they were not furnishing any water? A. I never heard any one complain.

Q. You don't know how much mud was in that tank, do you? A. No, sir; the tank was leaking—it was dry up above.

Q. I will ask you to state if, in the presence of the representatives of the company, there were not complaints and expressions of indignation that the company was not furnishing water? A. I never heard anyone in that crowd, but I heard it all over town—general talk.

RE-DIRECT EXAMINATION.

Q. You found the water just as you said, and you (489) have no interest in this matter? A. None at all. It certainly was full.

Mr. RANKIN THOMAS, for the defendant:

Q. Where do you live? A. In Greensboro.

Q. Remember the occasion of this fire? A. Yes, sir.

Q. Where were you when the alarm was turned in? A. I was about three-quarters of a mile from the courthouse.

Q. How soon did you get up here? A. Quick as a horse could run—within three to five minutes.

Q. From the time of the alarm? A. Yes, sir.

Q. State if at any time during the progress of that fire you went to the tank? A. Yes, sir.

Q. At whose instance? A. Mr. Wyrick's.

Q. Was D. E. Thomas there? A. He did not go on top.

Q. Did he say anything about going up? A. Something was said. He went on the platform, but did not go to the top.

Q. How long after you arrived at the fire before you went to the water tank? A. Between fifteen minutes and half an hour.

Q. Did you go to the top? A. Yes, sir.

Q. Who went with you to the tank? A. D. E. Thomas and Mr. Wyrick.

Q. You say you went up to the top of the tower? A. Yes, sir.

Q. Make any measurement? A. No, sir.

Q. Did you look at it—how near the top was it? A. Not over three feet from the top of the water.

Q. Between fifteen and thirty minutes from the time of the alarm you went up and found that much water? A. Yes, sir.

Q. Did you go up any more? A. No, sir.

(490) CROSS EXAMINATION.

Q. You went to see whether it was giving out? A. To see if any was in there.

Q. From the way it was up here you— A. I could not tell you anything about how it was up here.

Q. Well, it was so that there was none up here? A. No; I could not say so.

Q. Don't you know there was none up here—that it was not strong enough to reach the fire? A. They did not reach it from the ground—or had not, some way.

Q. Don't you know they could not reach it over two hours after the fire began? A. I won't swear they did or did not.

Q. How could you go and look into that tank and tell how deep it was? A. I was not paying any attention to it up here.

Q. You just wanted to see how much was in that tank, and cared nothing about the burning of the Benbow? A. They asked me to go.

Q. Mr. Wyrick, a representative of the company, asked you to go? A. Yes, sir.

MR. VUNCANNON, for the defendant:

Q. Do you remember the occasion of the fire at the Benbow? A. Yes, sir.

Q. Did you go to the fire? A. No, sir.

Q. Remember seeing Mr. D. E. Thomas and Mr. Rankin Thomas at the tank? A. I don't know as I do.

Q. Did you make an examination of the tank? A. Mr. Wyrick asked me to examine the tank, and I went.

Q. How long after the alarm did you go? A. I don't know, sir.

Q. What did you do? A. I went on the tank and Mr. Kersey was on top, and I started up, and got about two-
(491) thirds of the way, and said I am satisfied the water is up there—saw it coming out.

Q. It was in three or four feet of the top? A. Yes, sir.

Q. Do you know the depth of the tank? A. No, sir.

Q. Have any idea? A. Nothing, only what I have heard people say.

CROSS EXAMINATION.

Q. Did you come to the fire at the Benbow? A. No, sir.

Q. The representatives of the Water Company were very much excited about it? A. I tell you I am further down on the hill, and there was nobody much down there, and I got a countryman to stay in my store while I was out.

Q. During the time the fire was raging up here he (Wyrick) was running round over there, and got you to go and look at the tank? A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. You were a member of the Board of Aldermen, and he asked you to go and look at it as a member of that Board? A. Yes, sir.

JOHN LEWIS, for the defendant:

Q. I believe you were subpœnaed by the plaintiff and not called to the stand? A. Yes, sir.

Q. Do you remember the occasion of this fire? A. Yes, sir.

Q. Where were you at the time of the alarm? A. Just going in the house to my dinner.

Q. How far south of the Benbow do you live? A. Four or five blocks, on South Elm street.

Q. How soon did you get to the fire? A. I have a tapper at my house, and heard it, and started at once—four or five minutes—I ran all the way.

Q. Just state, in your own way, the part you took,
(492) and what you saw there at that fire? A. When I go there the hook and ladder truck was attempting to throw

water across the building, and I saw the engine standing at the other end near the corner. I am connected with the engine, and made my way to it as fast as I could. We had got some oil, and got some more. We got her going, and she ran twenty or thirty minutes, and she broke down.

Q. Did you stay at the ladder? A. I was at it just once—there were two or three lines of hose, were laid. My business was to go to the engine, and I knew it was going to take the engine to put it out.

Q. Had they been throwing water with it when you got there, how long were you getting up steam? A. No; just getting up steam—eight or ten minutes.

Q. From the time of the alarm it was 5 minutes before you got there, and then the time they were getting up steam? A. Yes; we were hurrying it as fast as we could with oil.

Q. Which hydrant were you at? A. The one at Gardner's.

Q. How many lines of hose had you there? A. Two lines

Q. In what direction were they turned? A. Towards the Benbow House—south.

Q. How long before the engine broke? A. I suppose half an hour

Q. How many lines did you say? A. Two lines.

Q. Where were they carried to? A. To the center of the Benbow building.

Q. Inside or outside? A. On the outside.

Q. What kind of a stream did the engine give you? A. Good for the two lines of hose.

Q. What kind of a stream could you have gotten with one line? A. Enough to have thrown it on top—I am certain of that.

Q. How long have you been connected with it? A. I (493) am the oldest man, and the longest one in it. I have not missed a dozen fires in twenty years.

Q. State, after you broke down, what you did? A. I think Mr. Lee came up from the railroad and made some suggestions, and they put a plug in it.

Q. Are you a mechanic? A. A little—I know something of running an engine.

Q. How long were you in restoring it so you could turn on the water again? A. I suppose half an hour.

Q. As much as you did restore it, did you use it full force? A. Yes; with two streams of water again.

Q. How high were you throwing it? A. I suppose to the the top of the mansard roof.

Q. Did you use any other hose during the progress of

the fire other than that in connection with the steam? A. Yes, sir.

Q. Which ones? A. They had a connection to the hydrant on West Market and Greene, near the Odd Fellows' Hall.

Q. How long were you in making that connection? A. Maybe ten minutes.

Q. Were you absent from the engine at any other time? A. No, sir; don't think so.

Q. Did the Winston engines come? A. Yes, sir.

Q. Where were they placed? A. One near the Guilford Bank and the other at Dalton's.

Q. What was the character of the stream they furnished? A. A good stream, reached up into the building.

Q. What time did they arrive here? A. Two or three hours after the fire started, I would say.

Q. Did you see the engine at the Dalton hydrant? A. That is the one I am speaking of.

Q. That was really the Salem company? A. I don't know.

Q. Did you see the other one at the Bank of Guilford? (494) A. I don't remember seeing it throw water—I was working on the back side most of the time.

Q. During the progress of the fire did you see any hose bursted operating there?

(Plaintiff objects.)

A. One line was burst on the engine.

Q. Did it burst much or little? A. Blowed the coupling off.

Q. The coupling is where you hitch two sections together? A. Yes, sir.

Q. What caused it to blow off? A. Some times pressure will do it—sometimes it is weak.

Q. It does take force to get it off? A. Yes, sir.

Q. Did you have to stop and fix it? A. Yes, sir.

Q. Where did you get the other section? A. On the street, I think.

Q. How long after the fire when that occurred? A. I could not state that exactly—I think it was after the engine had been repaired and started again.

Q. Do you know how many lines of hose were out in all? A. There was one I noticed at the Guilford Bank, when I passed, and another at the corner of the Benbow House, and there was the engine.

Q. That was three taps on the main line? A. Yes, sir.

Q. There was subsequently a tap on Market street? A. Yes; I put it there.

Q. How long after you got there? A. Might have been an hour, maybe not so much.

Q. Did you go during the first hour or two to the Dalton hydrant? A. I was there once or twice. There was only one line there, as I recollect.

Q. Where were they using that? A. On the west end of the Benbow House where the fire originated. It had gotten almost to the front at that time.

(495) Q. What about the line Jno. Dick had back of the laundry? A. I don't know.

Q. You cannot say it was not there? A. No, sir.

Q. Did you see any kinks in the hose that day? A. Can not say I did.

Q. Know anything as to the line that ran into the building up stairs? A. One line in there, I think.

Q. Did you see it laid out? A. I never went into the Benbow House at all.

Q. As to that on the street, was it laid straight? A. Yes; as far as I know.

Q. Do you know where the colored company made a connection? A. I think on Davie street.

Q. How many lines in all were laid out? A. Two from the engine, one from the Benbow corner, one from West Market, and one from Dalton hydrant, and one from the Guilford Bank.

Q. And one from Davie street? A. I think so.

Q. You know of those five connections. Can you say there were no more? A. No, sir.

Q. Know how many were playing at any one time? A. I know three were at one time.

Q. Did you go to the tank? A. No, sir.

CROSS EXAMINATION.

Q. You saw three at one time—you don't mean to say that there were five lines in operation at any one time? A. I have every reason to believe it, but would not swear it.

Q. Don't you know as a matter of fact the engine did not have two—it had not started, and the one at the Guilford Bank and at the corner were all you saw, and it took you fifteen minutes after that to get the engine ready to start? A. Fifteen minutes from the time I left home. When I passed there were only two that I saw.

Q. You have a splendid fire company here? A. We count we have.

(496) Q. You win prizes at Wilmington, Charlotte, Goldsboro, etc.? A. Yes; that has been our record.

Q. And you can get there quicker and do more tricks after you get there than any other company in the State? A. I never heard that.

Q. Well, you are well equipped? A. Yes, sir.

Q. How long was the engine broken? A. Twenty or thirty minutes.

Q. And the fire was burning three or four hours? A. Yes, sir.

Q. May have been less? A. It was as much as twenty.

Q. You don't swear that you had two lines attached to the engine all the time? A. All the time I was there.

Q. And you knew you could not reach the fire with two lines? A. Yes; and I will tell you why it was done. One engine here was authorized to put on two streams, and the engineer objected, and the Chief told me to do it, and it was done under his orders.

Q. I will ask you if you don't know in the presence of 500 men there, that there was not enough water to reach that mansard roof from the street? A. No, I do not.

Q. Don't you know that you were the only man in this town that saw it? A. I know it did reach that far after the engine was repaired.

Q. Then why did you not put the fire out? A. Could not put it out.

Q. Why you say you got there, and that your engine could put the water on it? A. I said it threw to the mansard roof after it was repaired.

Q. Pray tell where it was before it was repaired. You told Mr. King that one line was taken inside and the other was put up on South Elm street, and you do not mean to say you did nothing before the engine broke? What were you doing all that time? A. One line went on the inside and the other on the truck.

(497) Q. The fire was in front at that time? A. Yes, sir.

Q. And it took you and your engine until the fire had got round there on the front to get the stream on it? A. The fire spread round in front by the time we got there.

Q. That was the second stream? A. We had two streams all the time.

Q. How long was it from the time the fire broke out in the back of the hotel before it got round to the front? A. I don't know how long.

Q. Was it not an hour? A. No, sir.

Q. Was it half an hour? A. I suppose between a half and an hour.

Re-Direct Examination.

Q. Had you substantially gotten the fire under control when the Winston engines came? A. Yes, sir.

RE-CROSS EXAMINATION.

Q. It was about burned up? A. No, sir.

RE-RE-DIRECT EXAMINATION.

Q. You saved nearly half of the building—all of it this side of the bar-room? A. Yes, sir.

L. A. WYRICK, for the defendant:

Q. Where do you live? A. In Greensboro.

Q. How long? A. Eleven years.

Q. Where were you raised? A. In this county about six miles northeast of here.

Q. Are you connected with the Water Company? A. I am.

Q. How long been with them? A. Seven years.

Q. Remember the occasion of this fire? A. I do, sir.

Q. Where were you? A. At home.

Q. Where do you live? A. On Belle Meade avenue. I was at home at dinner.

(498) Q. How far from the Benbow is your house? A. Not over five blocks, I should think.

Q. What did you do when the alarm was turned in? A. Came uptown on horseback. The horse was saddled at the hitching post in front of my house.

Q. How long did it take you to get here? A. Not over two or three minutes.

Q. Did you go to the water tank down here? A. I did.

Q. How long after the alarm? A. I suppose ten or fifteen minutes afterwards.

Q. Any one with you? A. Nobody at first.

Q. Did you go on the tank? A. I did.

Q. Did you see the water or make any measurements? A. I did not make any measurements.

Q. What did you find? A. I found it within two and a half feet of the top, and running out.

Q. What did you do then? A. I came back up town and met Mr. Albright.

Q. Did you go back with him? A. No, sir.

Q. Did he speak to you? A. He told me he was going to see how much water was in the tank, and I gave him the keys to the tower so he could get in there.

Q. Well, he went on his way, and what did you do? A. I came up a little further and met Mr. El. Van Thomas, and Rank, and I said let's go down and on the tank.

Q. You had already been up there? A. Yes, Rank went up the ladder, and El. Van stayed on the frame.

Q. What did Mr. Thomas report? A. He said it was full.

Q. What did you do then? A. I went and asked Mr. Vuncannon to go up there. I asked him to come because he was close to the tower, and was a member of the Board of Aldermen.

Q. Did you go to the pumping station during the pro-
(499) gress of the fire? A. I went there after we came from the tank.

Q. How long from the time the alarm was sounded till you got back up here to the Benbow? A. I think not over half an hour.

Q. What did you do then? A. I went to the pumping station.

Q. What were they doing out there? A. The big pump was running.

Q. Who did you see? A. Mr. Jenkins—he is the gentleman in charge there.

Q. Do you know how long he has been working for the company? A. I am not sure whether it is three years or not.

Q. Do you know how much that pump sends up here per minute? A. No, sir. I came back to town then.

Q. Did you hear Mr. Land testify as to a conversation with him by you? A. I do not remember Mr. Land speaking to me about it at all.

Q. Remember to have seen him during the progress of the fire? A. I don't remember having any conversation with him about this matter at all. Have no knowledge of it.

CROSS EXAMINATION.

Q. You say you have no recollection of it? A. No, sir; I do not remember it.

Q. You were very busy that day, were you not, going back and forth to the tank, and there were a great many people out there speaking to you about it? A. That is generally the way.

Q. And they generally don't furnish the water? A. No, sir.

Q. It is a general rule that you have to get men to go up that tank isn't it? A. No, sir.

Q. Why on that occasion? A. Simply because I had started down and met these people, and just turned them loose and let them examine it.

(500) Q. Why did you go to Mr. Vuncannon? A. Because he was a member of the Board of Aldermen.

Q. And you wanted him as a witness in this suit? A. No; I did not anticipate any suit.

Q. You were there when they could not get a stream to the second story window were you? A. No; I was not in the Benbow House at all.

Q. Did you not notice the water? A. No; I had nothing to do with the hose.

Q. You manage the business in the absence of General Glenn, don't you? A. In a general way I do I look after what I am instructed to look after.

Q. Was General Glenn here then? A. I think he was.

Q. How far was it from up town here to the pumping station? A. It is between a half and three-quarters of a mile.

Q. I ask you if you did not go out there because there was no pressure up here? A. No, sir; I knew what was in the standpipe, and I went out there to have him keep his pump going.

Q. If it was full what were you so anxious about? A. If you are constantly using it out—the street was flooded with water.

Q. And you say you did not see the streams? A. No; I didn't look for them.

Q. Why didn't you look for it, it was your business to furnish the water, wasn't it? A. Yes; and we were furnishing it.

Q. Do you swear that you did not notice how high the streams were going? A. I do. I was not handling the hose, and had nothing to do with the stream.

Q. What did you go to the tank so much for, and have other people running up there? A. I went simply because they were yelling that they had not water as usual. They always make that kick—these kickers that are al-
(501) ways kicking whether there is anything to kick about, and they are not connected with the fire company either, mostly standing round looking on.

Q. I ask, sir, if the very reverse is not true, and have they not gotten several judgments now against your company here in this court for not furnishing water?

(Defendant objects. Objection sustained.)

Q. The pump was running? A. Yes, sir; the large pump.

Q. If both pumps had been running it would have given better pressure? A. I have never seen it done. Don't think it was necessary—it is not necessary on any occasion.

Q. This is the main line of pipe along out here is it? A. Yes.

Q. You have a flood gate down at the water tower—or what do you call it? A. A gate.

Q. And you can let it down and prevent any more

water from going into the tank? A. Yes; if you want to.

Q. I ask you this question—if your system is not so arranged that you can let down the gate at the tower, and put a direct pressure on the hydrants from the pumping station? A. It can be done. There is a gate there.

(Defendant objects.)

Q. Was that done on this occasion? A. It never has been done since I have been connected with the company.

Q. I ask you if the natural pressure is the standpipe pressure? A. The natural and the standpipe pressure. The pressure comes from the standpipe, and the pumping station also.

Q. Did you see Mr. Kersey that day? A. Yes, sir.

Q. Did you not refuse to let him go on the tower? A. No; he did not ask me.

Q. Did you not tell him you could not let him go until he had instructions? A. No, I did not. I did not refuse anybody.

(502) RE-DIRECT.

Q. If you turned the gate at the bottom of the tower that would cut off the storage, wouldn't it? A. Yes, sir.

Q. And to cut it off would be to retain it all in the tower? A. Yes, sir.

Q. It is your business to look after it and see that it is in good fix? A. Yes, sir.

Q. Everything was all right? A. Yes, sir.

Q. About that Land conversation, do you think you would have remembered that conversation if you had had it? A. I think I would, sir.

R. J. MARKS, for the defendant:

Q. Mr. Marks, do you remember the occasion of this fire? A. Yes, sir.

Q. Hear the alarm? A. Yes, sir.

Q. How long have you been here Mr. Marks? A. About nine years.

Q. Are you connected with the water company, or have you ever been? A. No, sir.

Q. Did you go to the tank? A. Yes, sir.

Q. How long after the alarm? A. Nearly an hour—between three-quarters and an hour—I went on the footway about half or two-thirds up the ladder, and saw the water oozing out between the staves three or four feet from the top.

(Not cross examined.)

J. E. JENKINS, for the defendant:

Q. What is your business? A. I'm an engineer.

Q. What experience have you had operating engines? A. Seventeen years—since '83.

Q. Are you engaged at the water station? A. Yes, sir.

Q. How long have you been there? A. Four years 9th day of next month.

(503) Q. You remember the occasion of the Benbow fire? A. Yes, sir.

Q. About what time of day was the alarm turned in? A. At 12:15.

Q. Have you an alarm down at the pumping station? A. Yes, sir.

Q. Is it connected with the system up town? A. Yes, sir.

Q. An alarm turned on as any place in town taps the same alarm at your place? A. Taps the same number.

Q. What were you doing—pumping or not? A. I was letting the fire die down to fix something.

Q. How long had you been pumping? A. Since about half past seven, all the time.

Q. Under ordinary conditions, when there is no special demand, about how many gallons can you send up per hour?

(Plaintiff objects. Sustained.)

Q. How many pumps have you? Which one was working? A. The big one.

Q. How many gallons when there is special demand for it do you send up here? A. Seven hundred and fifty per minute.

Q. Is that your extreme capacity? A. No, sir.

Q. What is it? A. Nine hundred and thirty-six gallons.

Q. You say you had been pumping since about half-past seven, and the tank was about full then, and you were going to stop for a little while and— A. Yes; we were going to stop for a little while—we never stop for more than an hour at any time.

Q. How could you tell the tank was about full? A. You can't tell exactly—I knew it was nearly full—the back pressure indicates when it is full.

Q. And the back pressure indicated that the tank was about full? A. Yes, sir.

Q. What did you do when the alarm was sounded? A. (504) Began pumping fast and continued till four or five o'clock in the evening.

Q. What was the condition of the pumps at that time? A. All right, sir.

CROSS EXAMINATION.

Q. Mr. Jenkins, you have a telephone at your office? A. Yes, sir.

Q. You were 'phoned about this time were you not by some one up town? A. I don't think so—don't remember.

Q. Who attends to your 'phone? A. I do myself, or my wife.

Q. She attends to it in your absence? A. Yes.

Q. Did Mr. Land 'phone you? A. No, sir; I don't remember that he did.

Q. How long after the alarm before you got the fire up—did you have good water out there? A. Plenty of water in the lake and pond and reservoir.

Q. And you can get it? A. Yes, we were getting it.

Q. Mr. Jenkins, you have a gate up here which you can let down and cut the water off from the tower and put a direct pressure on the hydrants? A. I think so.

Q. If that is put down the pressure you give goes direct to the hydrants along this line out here? A. If I was running the pumps fast it would burst the hose all to pieces.

Q. And burst the main too? A. That is not probable.

Q. You can send it in so fast as to burst the hose, and you had enough water to do it that day, and knew that the fire was going on up here? A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. You say if they were to shut off that gate and you were to pump against the hose it would bust them? A. Yes; it would tear them—they are all the time shutting off the hose, and they very often burst them.

(505) RE-CROSS EXAMINED.

Q. They complained to you all along that you were not furnishing water? A. I heard of it.

Bond.

NORTH CAROLINA, Guilford County. } In the Superior Court, January Special Term, 1901.

B. J. Fisher
against
Greensboro Water Supply Company.

The undersigned hereby acknowledge themselves in-

debted to the defendant company, to-wit, The Greensboro Water Supply Company, in the sum of fifty dollars, as witness our hands and seals, this the 21st day of February, 1901. Whereas, the plaintiff has appealed to the Supreme Court of North Carolina from a judgment of the Superior Court of Guilford County rendered at the January Special Term, 1901, in a case wherein B. J. Fisher is plaintiff and the Greensboro Water Supply Company is defendant. Now the condition of this obligation is such that if the appellant shall pay all costs which may be awarded against him on said appeal then this obligation shall be void, otherwise to remain in full force and effect.

B. J. FISHER, [Seal]
By JOHN N. STAPLES, Attorney.
E. P. WHARTON, [Seal]
————————, [Seal]

E. P. Wharton, surety on the foregoing bond, maketh oath that he is a resident of Guilford County, North Carolina, a freeholder, and that he is worth double the amount specified in the bond over and above his personal property and homestead exemption, and all debts and liabilities.

(506) Sworn to and subscribed before me, this the 25th day of February, 1901.

JOHN J. NELSON, C. S. C.
By J. R. RANKIN, D. C.

STATE OF NORTH CAROLINA, }
Guilford County. }

I, John J. Nelson, Clerk of the Superior Court for said county, do hereby certify that the foregoing is a true transcript of the record in the case B. J. Fisher against The Greensboro Water Supply Company, as same appears of record and file in this office.

In witness, my hand and official seal at office in Greensboro, N. C., this 28th day of February, 1901.

[Seal] JOHN J. NELSON, C. S. C.

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Endorsed:

"Filed in this office this February 27th, 1902, at 12:30 o'clock P. M.

SAM'L L. TROGDON, Clerk.
Per W. E. BLAIR, Deputy Clerk."

OPINION OF THE COURT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(508) WESTERN DISTRICT OF NORTH CAROLINA.
IN EQUITY. AT GREENSBORO.

The Guardian Trust and Deposit Company }
vs. }
Greensboro Water Supply Company. }

Before SIMONTON and BOYD, J. J.

SIMONTON, Circuit Judge:

This cause comes up on the pleadings, petitions for in-

tervention, and a report of the master, merely stating testimony before him. The questions made in it arise under a bill for foreclosure of mortgage, filed by the Guardian Trust and Deposit Company against the Greensboro Water Supply Company. The complainant, as trustee, held certain bonds of the defendant company, secured by a mortgage of the property, plant and franchises of the defendant company, subordinate in lien to a mortgage executed upon the same property, plant and franchises by the Greensboro Water Company. A receiver having been appointed for the mortgaged property, a contract was entered into between the receiver and the City Council of Greensboro looking to the purchase of all the mortgaged property, at private sale, for the sum of $75,000. Upon applying to the court for the approval and confirmation of this sale, it appeared that the Guardian Trust and Deposit Company of Philadelphia, trustee, holding the mortgage securing the $50,000 of bonds of the Greensboro Water Company was a necessary party before such sale could be confirmed. An order was entered making this last named trustee a party. On its appearance and with its assent, the proposed sale was approved and confirmed, the money derived therefrom to stand in the place of the property in all respects, and to be held subject to the further order of the court. The questions in this case relate to the proper distribution of this fund and the priority of claims thereon. (509) The trustees of the two mortgages claim that the fund must be applied towards satisfaction of their mortgages, according to their priorities. The intervenors, who are judgment creditors of the Greensboro Water Supply Company, insist that under the statute law of North Carolina, in force when the mortgages were executed and which must be read as if incorporated in the mortgages, priority is given to judgments of the class to which their judgments belong, over any mortgage executed by the defendant corporation. The facts of the case are these:

In 1887, a Water Company was organized in Greensboro, North Carolina, whose corporate purpose was to furnish that city and its inhabitants with water for domestic, sanitary and fire purposes. On 29 December of that year, the articles of agreement and letters of incorporation were filed with the clerk of the Superior Court of Guilford County, in which Greensboro was, and the name of the Greensboro Water Company was given to the corporation. These articles and letters were amended and ratified by the General Assembly of North Carolina on 3 March, 1891. Private Laws of North Carolina, Ch. 166, pages 1009, '10.

Very soon after its incorporation in 1887, the Greensboro Water Company secured the passage of an ordinance by the City of Greensboro, under which it obtained franchises and rights to the exclusive use of the streets, sidewalks and public grounds, for the purpose of constructing, operating and maintaining a complete system of water works; at the same time it obtained an agreement from the city to pay annually for a term of years money to the said company, in consideration for the supply by the said company of hydrants in various parts of the city, with an adequate water pressure at all times to extinguish fire and to keep its tower, reservoir, &c., supplied with water day and night, so as to secure to the city and its inhabitants protection against fire. After this contract was made, the Greensboro Water Company executed a deed of trust to the Guardian Trust and Deposit Company of Philadelphia, to secure the payment of bonds aggregating $50,000, the (510) deed covering all its property and plant. And on the first of May, 1891, the Greensboro Water Company executed a second deed of trust upon its plant to R. R. King and A. H. Taylor, to secure a second bond issue of $20,000.

In 1892, a bill was filed in this court by J. W. Middendorf et al., on behalf of holders of the bonds secured by the second mortgage, and also as representatives of holders of bonds under the first mortgage, against the Greensboro Water Company, seeking the appointment of a receiver and praying a sale of the property. A receiver, James D. Glenn, was appointed, who managed the property. But in 1895, under a decree of this court R. R. King and A. H. Taylor were appointed commissioners to sell the property, which sale took place on 30 April, 1896. At this sale Hugh L. Pope became the purchaser, under an agreement had between all the bondholders and all parties interested, made before the day of sale, Pope acting as agent of all parties. Conveyance having been made to Pope, he at once conveyed all the plant and property purchased to a corporation then and there formed, named the Greensboro Water Supply Company. The conveyance to Mr. Pope and his conveyance to the new company were expressly declared to be subject to the mortgage held by the Guardian Trust and Deposit Company of Philadelphia for $50,000. Among the property conveyed in the deed of these commissioners, and also in the deed of Hugh L. Pope, was the contract for furnishing the city with water as above stated, and of course the franchises under which the contract was made. This contract among other things had this provision: "Said water company shall be responsible

for all damages sustained by the city or any individual or individuals for any injury sustained from the negligence of said company, either in the construction or operation of the plant." This contract having been so purchased and conveyed to the Greensboro Water Supply Company, this company assumed the same and thenceforward conducted its operations under its provisions; receiving the tolls from the city and from its inhabitants, and from this (511) source principally paying the interest on the $50,000 first mortgage bonds.

On 1 July, 1896, the Greensboro Water Supply Company executed a deed of trust of all its franchises and property to the Guardian Security and Deposit Company of Baltimore, Maryland, to secure the payment of bonds to the amount of $110,000 in two series, the first series of eighty bonds known as Series A, and the other thirty as Series B; of Series A bonds to the amount of $50,000 were set apart to meet the $50,000 first mortgage bonds, as the conveyance was expressly stated to have been made subject to this lien. The original first mortgage bonds, however, have never been retired. The proceedings in the bill of this case were instituted to foreclose this mortgage, under which R. R. King was named as receiver. They bear date 19 September, 1900. Anterior to the filing of this bill in the month of June, 1897, two buildings in the city of Greensboro, with stocks of goods therein, were destroyed by fire. One of these buildings was owned by Charlotte Gorrell and the stock of goods therein by A. A. Hinkle, who had prior to the fire made an assignment to A. M. Scales. The other building was owned by Helen G. Brown and the goods therein by Hodgin, Pegram & Co., who after the fire assigned all their interest to A. M. Scales. In the month of August, 1897, Helen G. Brown, and A. M. Scales, assignee, instituted several suits because of these fires, in the Superior Court of Guilford County against the Greensboro Water Supply Company.

On —— day of June, 1899, another fire occurred in Greensboro, in which the property of B. J. Fisher, known as the Benbow Hotel, was partially destroyed by fire. Fisher also instituted suit against the Greensboro Water Supply Company because of this fire. These causes were pending when the receiver was appointed for the Greensboro Water Supply Company. The answer having already been filed in the Fisher case, the receiver filing the answers in the Scales cases. At the ensuing January term of the Superior Court for Guilford County, the cases were heard. Upon the issue submitted to the jury in the several cases they found for the plaintiff, that is to say, for Fisher $25,-

000, for Scales, assignee of Hinkle, $3,200 for Scales, (512) assignee of Hodgin, Pegram & Co., $1,800 and for Helen G. Brown $3,000. Thereupon the plaintiff in each case submitted to the court an order for judgment, in which, after reciting the issues found by the jury, it proceeds: "It is therefore on motion of counsel for plaintiff, ordered, adjudged and decreed, that the plaintiff recover of the defendant ——— dollars, damage *for the tortious injury and damage done him by the negligence of the defendant*," and the costs of this action. The court refused to sign this order because of the words underscored. An appeal was taken to the Supreme Court of North Carolina by the plaintiff, and on hearing the action of the lower court in refusing to sign the judgment was held error. That the action was brought and properly brought in tort. This decision was filed in the Fisher case. (128 No. Ca. 375.) Thereupon the appeals were withdrawn in the other cases, the Fisher decision having been held to settle the question.

In the main case the master was instructed to call in creditors. The bondholders coming in proved their deeds of trust and their bonds. The parties holding these judgments proved them. The question is as to priority of their judgments over the mortgage debt, under the statute law of North Carolina. Section 1255 of the Code of 1883. This section is in these words:

"Mortgages of incorporated companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of this state for labor performed (nor for materials furnished such incorporation), nor for torts committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This section has been amended so as to eliminate the sentence in brackets.

This section gives priority to judgments obtained (513) against the corporation making a mortgage over the lien of the mortgage. In the case at bar there are two classes of mortgages. One class is a mortgage executed by the Greensboro Water Company. The other is a mortgage executed by the Greensboro Water Supply Company. The judgments are against the Greensboro Water Supply Company.

The judgment creditors claim that they are entitled to

priority over the mortgage of the Greensboro Water Company, as well as over the mortgage of the Greensboro Water Supply Company

When the proceedings for the sale under foreclosure of the property of the Greensboro Water Company were instituted, they were conducted in an amicable way: and when the sale took place all parties and stockholders, the corporation and the creditors, constituted Mr. Pope, their common agent. Under the arrangement made by them all, he purchased at the sale and immediately thereafter conveyed to the Greensboro Water Supply Company. This company took subject to the first lien for $50,000 and bonds of the second lien were used in payment of the bid; the cash advanced by the first mortgage bondholders being returned to them in bonds of the new company. Under the operation of Section 697 of the Code of North Carolina, when a sale has been made under a deed of trust or mortgage of all the property of a corporation and a conveyance made pursuant to such sale, "upon such conveyance to the purchaser the said corporation shall *ipso facto* be dissolved and the purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the same manner in which the conveyance shall be recorded." Section 698, declares that the corporation so created shall succeed to all the franchises, &c., and perform all such duties as would or should have been performed by the first corporation, save only that it shall not be entitled to the debts due to the old corporation, and be liable for none of its debts or claims which may not have been expressly assumed in the contract of purchase. So when the sale in question and the conveyance pursuant thereto took place, the Greensboro Water Company *ipso*
(514) *facto* was dissolved. The new company assumed all its duties, and in the contract of sale assumed the $50,000 mortgage. All this pursuant to an agreement in which the first mortgage creditors took part. The new corporation was but a continuation of the first. The first mortgage became its mortgage and must be treated as such. There is another point of view. When the foreclosure of the mortgage of the Greensboro Water Company was had, it was under contract with the City of Greensboro to furnish water for a term of years. This contract was assumed by the new company, with the assent of the old company, and was in course of performance, no new contract having been made. So the Greensboro Water Supply Company was really acting for and in behalf of the old company,

and the latter was liable also. (*James* vs. *Western N. C. Railroad*, 28 So. E. Rep., 538.)

This brings us to the question in the case. Have those judgments a lien prior to the lien of the mortgages?

Are these judgments "for torts" committed by the corporation, its agents or employes, whereby property was injured?

The intervenors produce the judgments in each case, which distinctly state that damages are given "for the tortious injury and damage done by the negligence of the defendant." The Supreme Court of North Carolina in this case held that, under the facts of the case, the plaintiff was entitled to declare in tort. That "although action may have been maintained upon a promise implied by law, yet an action founded on tort was the more proper form of action and the plaintiff so declared." (*Fisher* vs. *Water Co.*, 38 S. E. Rep., 914.) This judgment is entitled to full faith and credit. As between the corporation and the plaintiff it would be conclusive. It is presented in a cause in which mortgagees are parties, and the question is not whether the judgment be valid, but whether it is a judgment of such a character as it will be given priority to the claim of the mortgagees, who were not parties to the suit in which it was obtained. "When such a judgment is presented to the court for affirmative action, while it cannot (515) go behind the judgment, for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. *Wisconsin* vs. *Pelican*, 127 U. S., 263. In *Hassall* vs. *Wilcox*, 130 U. S., 503, in a proceeding marshalling claims against an insolvent estate, it was held that the trustee of a mortgage had a right to contest the priority of lien of a judgment rendered in a State court, and compel the intervenor to prove affirmatively the existence and priority of his lien. The Supreme Court of North Carolina in *Fisher* vs. *Water Company* (*supra*), pressed for a decision upon this point, whether that was such a judgment as was protected under Section 1255 of the Code, declined to answer the question.

This section of the Code gives priority to judgments for torts committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured.

In the case at bar property was injured because of the alleged negligence of the Greensboro Water Supply Company. Would an action for tort lie?

The Greensboro Water Supply Company had assumed the obligation of supplying the city and its inhabitants

with water for domestic and public purposes, and also for the purpose of extinguishing fires. The Supreme Court of North Carolina had held in the case of *Gorrell* vs. *Water Company*, 124 N. C., 386, that an action would lie against the corporation as well on the part of the city council as on that of any citizen of the city. The judgments before us establish the fact that such a supply of water for the purposes of fire was not furnished. They also establish the fact that the failure to do so was because of the negligence of the defendant. Is such negligence the foundation of an action in tort?

The grand division of causes of action into such as arise *ex contractu* and such as arise *ex delicto*, contract or tort, underlying the system of the common law. Under the old practice the forms of action must conform to this division. A contract as a contract, could not be enforced (516) in an action in form *ex delicto*. Nor could a tort be relieved in an action in form *ex contractu*. And although the Code has abolished all distinction between forms of action, still the distinction between causes of action remains. In Code pleading the action proceeds upon the statement of facts of the case, and on these facts the court draws the conclusion whether the cause of action is founded on the contract or on a tort. (*Young* vs. *Telegraph Co.*, 107 N. C., 384.)

The Greensboro Water Supply Company, as has been seen, under the obligation of a contract to furnish a full supply of water to the city and its inhabitants for sundry purposes, including that of fire. And under this obligation it was its duty to do so whenever needed. Beside this, indeed, to facilitate the performance of this obligation and in consideration of this obligation, it was clothed with valuable franchises under which it used the streets of the city in laying its mains. Under its obligation it was to furnish the city and its citizens with one of the necessities of life, and was bound to furnish all that desired it, who paid the price imposed. It served the public, and to this extent was a *quasi* public corporation, bound to the discharge of a public duty. (*Griffith* vs. *Water Co.*, 122 N. C., 206. *Coy* vs. *Indianapolis Co.*, 36 L. R. A., 535.) So it was the duty of the Water Company to furnish the water for fire, a duty arising out of an express contract and out of the franchises granted to it for the purposes of public utility and need. It did not fulfil this duty. Chitty, in discussing actions on the case (a form of action *ex delicto*), and of the injuries for which relief could be had under this form of action, says: "These injuries may be either by nonfeasance or the omission of an act which

the defendant ought to perform, or by misfeasance, being the improper performance of an act which might lawfully be done or by malfeasance, the doing what the defendant ought not to do, and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law or the particular rights and duties of the parties or of some express or implied contract (517) between them. (Chitty on Pl., 11th Am., Edition 133.) And in the same volume, in stating the requirements of the declaration, in actions for torts, Mr. Chitty says: "When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of that duty, which we have seen may be founded either on a contract between the parties or on the obligation of law arising out of the defendant's participation, character or situation. (1 Chitty on Pl., 383.)

Jaggard, in his work on torts, says: While normally a breach of a contract gives rise to a cause of action *ex contractu*, a contract may impose a duty on the part of the defendant as party to it, for the violation of which the plaintiff may recover *ex contractu* or *ex delicto*, at his option. (2 Jaggard on Torts, 897.) And Addison on Torts, Section 28, holds the same doctrine.

In the case of *Fisher* vs. *Water Company*, one of the judgments proved here, the Supreme Court of North Carolina held that the complaint stated facts justifying the entry of the judgment "for tortious injury and damage done him by the negligence of the defendant." That from the statements of the complaint "an action founded on tort was the more proper form of action." (*Fisher* vs. *Water Co.*, 38 So. E., Rep., 914; 128 N. C., 375.)

As between the corporation and these judgment creditors this decision is conclusive. It did not bind the mortgage creditors, nor could the judgments have been enforced against the property of the corporation as that was in the hands of this court. We have therefore examined the record of the case of Fisher against the Water Company, and, aided by the arguments of counsel, have inquired into the correctness of the decision therein rendered. The only question is, will an action as for a tort lie against a defendant who has negligently performed an express contract. We have seen that in entering into this contract the Water Company assumed a duty to the public. Mr. Chitty, quoted *supra*, says that under circumstances like these the plaintiff may proceed either *ex contractu* or *ex delicto*. In other words, the negligence in not performing a con- (518) tract of this character, whereby property has been

injured, is a tort as well as a breach of contract, and that on such a tort action will lie. The judgments in question then are judgments in tort and are protected by Section 1255.

Let a decree be entered giving priority to the lien of these judgments over the lien of the mortgages.

Endorsed:

Filed in this office March 24, 1902.

SAM'L L. TROGDON, Clerk.

DECREE OF THE COURT.

(519) IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

AT GREENSBORO.

Guardian Trust and Deposit Company *vs.* Greensboro Water Supply Company. } In Equity.

DECREE.

This cause coming on to be heard, and having reference to the opinion filed directing a decree to be entered giving priority to the lien of the judgments of B. J. Fisher for $25,000.00; A. M. Scales, assignee of A. A. Hinkle, $3,200 00; A. M. Scales, assignee of Hodgin, Pegram & Co. for $1,800.00, and Helen G. Brown for $3,000.00 against the Greensboro Water Supply Company, over the lien of the mortgages therein referred to.

Upon consideration, it is ordered, adjudged, and decreed by the court that the said judgments are entitled to priority of payment over and above the lien of the mortgages set out and described in the papers, writings and records in the proceedings filed in this cause:

Now, upon motion of counsel for said judgment creditors, it is ordered and decreed that out of the monies and funds now in the custody of this court, arising from the sale of the property of the Greensboro Water Supply Company to the city of Greensboro, and held for distribution under the orders of this court, that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of twenty-five thousand ($25,000) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the Superior Court of the county of Guilford, North Carolina; to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of three thousand and two hundred ($3,200) dollars, with interest

thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to A. M. (520) Scales, assignee of Hodgin, Pegram & Co., or his attorneys of record, the sum of one thousand and eight hundred ($1,800) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to Helen G. Brown, or her attorneys of record, the sum of three thousand ($3,000) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court, said interest on the said several judgments to be at the rate of six per centum per annum until paid.

It is further ordered that the costs, both in the State Court and in this court, incident to and on the said several judgments, be likewise paid by the said receiver out of the said funds.

And this cause is retained for further orders and directions.

Let this decree be enrolled.

This March 24, 1902.

Endorsed:

Filed in this office March 27, 1902.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S EXCEPTIONS AND ORDER ALLOWING SAME.

IN THE CIRCUIT COURT OF THE UNITED STATES, THE
(521) WESTERN DISTRICT OF NORTH CAROLINA,
AT GREENSBORO.

Guardian Trust and Deposit Company
vs.
Greensboro Water Supply Company. } In Equity.

The complainant in this action hereby excepts to the ruling opinion of the court and decree as being contrary to law and equity, for the reasons set forth in the assignments of error herewith filed.

This, the 14th day of April, 1902.

ARCHIBALD H. TAYLOR,
BYNUM & BYNUM,
Solicitors for Complainants.

The foregoing bill of exceptions is allowed.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

RESPONDENT'S EXCEPTIONS AND ORDER ALLOWING SAME.

IN THE CIRCUIT COURT OF THE UNITED STATES, THE
(522) WESTERN DISTRICT OF NORTH CAROLINA,
AT GREENSBORO.

Guardian Trust and Deposit Company
vs.
Greensboro Water Supply Company. } In Equity.

The respondent in this action hereby excepts to the ruling opinion of the court and decree as being contrary to law and equity, for the reasons set forth in the assignments of error herewith filed.

This the 14th day of April, 1902.

ARCHIBALD H. TAYLOR,
BYNUM & BYNUM,
Solicitors for Respondents.

The foregoing bill of exceptions is allowed.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

PETITION OF THE GUARDIAN TRUST AND DEPOSIT COMPANY FOR AN ORDER ALLOWING AN APPEAL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(523) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO.

The Guardian Trust and Deposit Company
vs.
The Greensboro Water Supply Company. } In Equity.

Petition of the Guardian Trust and Deposit Company, complainant, for an order allowing an appeal from the final decree heretofore entered in said case, to the United States Circuit Court of Appeals, for the Fourth Circuit.

The above named Guardian Trust and Deposit Company, complainant, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause the 24th day of March, 1902, wherein and whereby it was ordered, adjudged and decreed that certain judgments of the judgment creditors, B. J. Fisher, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram & Company and Helen G. Brown, are entitled to priority of payment over and above the lien of the mortgages set out and described in the papers, writings and records in the proceedings filed in this cause (meaning the mortgage made to said complainant by the Greensboro Water Supply Company in this proceedings mentioned) and that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of $25,000 with interest from January 14th, 1901, and to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of $3,200 with interest thereon from January 14th, 1901, and A. M. Scales, assignee of Hodgin, Pegram and Company, or his attorneys of record, the sum of $1,800 with interest thereon from January 14th, 1901, and to Helen G. Brown, or her (524) attorneys of record, the sum of $3,000, with interest thereon from January 14th, 1901, etc., does hereby appeal from the said order and decree of March 24th, 1902, to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed, and that a transcript of the papers, records and proceedings in said suit, upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit, and also that an order be made fixing the amount of security which the said complainant shall give and furnish for such appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals for the Fourth Circuit.

And your petitioner will ever pray.

ARCHIBALD H. TAYLOR,
BYNUM & BYNUM,
Solicitors for Complainant.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

COMPLAINANT'S ASSIGNMENT OF ERRORS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(525) WESTERN DISTRICT OF NORTH CAROLINA,
AT GREENSBORO.

Guardian Trust and Deposit Company
vs.
Greensboro Water Supply Company. } In Equity.

Assignment of Errors upon Appeal of Guardian Trust and Deposit Company, Complainant.

The Guardian Trust and Deposit Company, complainant in these proceedings mentioned, files the following assignment of errors upon which it will rely upon its appeal from the decree of the said Circuit Court of the United States, passed in this cause March 24th, 1902:

The said complainant assigns as error upon this appeal, the following, viz.:

1. The said court erred in deciding and decreeing that the judgment of B. *S.* Fisher for $25,000, of A. M. Scales, assignee of A. A. Hinkle for $3,200, of A. M. Scales, assignee of Hodgin, Pegram and Company for $1.800, and of Helen G. Brown for $3,000, against the Greensboro Water Supply Company, are entitled to priority of payment out of the fund, the proceeds of the sale of the property in this cause, over and above the lien of the complainant, the Guardian Trust and Ceposit Company, trustee under the mortgage in these proceedings referred to.

2. The said court erred in ordering and decreeing that out of the moneys and funds now in the custody of this court arising from the sale of the property of the Greensboro Water Supply Company to the City of Greensboro, and held for distribution under the order of this court (526) that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of $25,000, with interest from the 14th day of January, 1901, the date of the docketing thereof in the Superior Court of Guilford County, North Carolina, to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of $3,200, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to A. A. M. Scales, assignee of Hodgin, Pegram, or his attorneys of record, the sum of $1,800, with interest thereon from the 14th day of January, 1901, the date of docketing thereof in the said Superior Court, said interest on the said several judgments to be at the rate of six per cent. per an-

num until paid, and in ordering the *the* costs both in the State Court and in said Circuit Court of the United States, incident to and on the several judgments, be likewise paid by the said receiver out of said fund, without reference to the lien or claim of said complainant or any allowance whatever of said complainant's claim.

3. The said court erred in not deciding that the said complainant was entitled to a lien under the mortgage made to it as trustee in said proceedings mentioned, for the full amount of the mortgage bonds of the Greensboro Water Supply Company issued and outstanding under said mortgage, with interest upon the principal of said bonds, accrued to date of said decree, viz.: interest equal to the amount of the unpaid coupons maturing prior hitherto, and the due proportion of the next maturing coupon, viz.: $30,000 Series A bonds and $30,000 Series B. bonds, next in order, and that said lien was prior to the lien of all other parties and intervenors in the said cause, except the lien of the respondent, the Guarantee Trust and Deposit Company, and especially prior to the lien of the said alleged judgment creditors, B. J. Fisher, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram and Company and Helen G. Brown, for the amounts in said decree of said court mentioned, any and all of them, and in not ordering and decreeing that the lien of the said complainant, trustee as aforesaid, for the said amount of $30,000 Series A bonds with all unpaid and *and* matured coupons, and $30,000 Series B bonds (527) with all unpaid and matured coupons should be paid by the receiver in this cause to the said complainant, trustee as aforesaid, prior to the payment of the liens and claims of all the other parties and intervenors in this cause appearing, except the said respondent, the Guarantee Trust and Deposit Company, and particularly prior to the claims upon judgments or otherwise of the said alleged judgment creditors, B. *F.* Fisher, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram and Company and Helen G. Brown, in said decree mentioned.

4. And the court erred in the terms of its said decree, for the reason that the said cause being matured and coming to a hearing upon the pleadings and the claim and demand of the said complainant as set out in its bill of complaint in these proceedings, and upon the claims and demands of all other parties and intervenors whatsoever, the said court did not allow the claim and demand of the said complainant for any sum whatsoever, and did not assign or give or determine a lien in favor of the said complainant upon the

said fund in the hands of the court for distribution, either prior to the liens, claims and demands of the other parties and intervenors in this cause, or in any order and place whatsoever, and the said complainant was entitled to have the amount of its said claim and the lien for said amount upon the said fund in the hands of the court in these proceedings, both absolutely and with reference to the liens, claims and demands of all other parties and intervenors and claimants in these proceedings mentioned, determined and adjudged, and the effect of the terms of the said decree of the said court is to ignore the rights, claims and demands of the said complainant, and to refuse to it any and all relief whatsoever in the premises, contrary to the law applicable to its case.

5. And the court erred in the terms of said decree for
(528) the reason, that the said court had assumed and had jurisdiction of the subject matter of the said suit, and of the parties to the said cause, upon and after the filing of the bill and amended bill of complaint of said Guardian Trust and Deposit Company, the complainant in said proceedings appearing, by reason of the citizenship of the parties to the cause, and for other reasons appearing upon the face of the proceedings in said cause, and the said complainant had the right to have the questions arising in said cause between it and the other parties to the cause, and especially between it and the said alleged judgment creditors, B. F. Fisher, A. M. Scales, assignee of A. A. Hinkle; A. M. Scales, assignee of Hodgin, Pegram and Company, and Helen G. Brown, fully tried, heard, and determined by this court without reference to or being affected or bound by the proceedings, adjudications and determinations of any State court whatsoever, and it was the duty of this court, in determining and deciding the questions between the said complainant and the said alleged judgment creditors or claimants, to have examined fully and for itself into the claims and demands of the said alleged judgment creditors, whether the same were valid against the said complainant, and, if valid, for what amount, and to have required full and affirmative proof of the same, according to the law and rules of evidence binding upon the Federal courts and this court, and to have allowed and given effect to the liens and claims of the said judgment creditors, and priority to the same over and at the expense of the lien and claim of the complainant, only if upon such proof and evidence taken and required, according to the law and rules of this court, the said claims and demands of the said alleged judgment creditors were found to be prior to the lien of the said complainant; but the said court, as appears

by the terms of its said decree, and the other proceedings in said cause, did not examine for itself into the claims and de-
(529) mands of the said judgment creditors to have their alleged judgments enforced against the complainant, and prior to and at the expense of the lien and claim of the said complainant, but decided, adjudged and determined the claims and demands of the said judgment creditors to be valid against the said complainant, and accorded them a lien prior to and at the expense of the right lien and claims of the said complainant solely by reason and by force and effect of the terms and form of the judgment and decision of the Superior Court of Guilford county, North Carolina, in these proceedings appearing and set out, as certified by said Superior Court of Guilford county, contrary to the law binding upon this court and to its jurisdiction and constitution, and contrary to the constitutional and lawful right of the said complainant to have the mutual issues, claims and demands between it and the said alleged judgment creditors fully tried, adjudged and determined by this court without reference to the judgment, opinion, determination or decision of the said Superior Court of Guilford county, North Carolina, or of any State court.

6. And the court erred in the terms of its decree aforesaid, for the reason that it appears, that the contract between the said Greensboro Water Supply Company and the City of Greensboro in these proceedings mentioned, the breaches of which, and of the obligations of said defendant under which contract were the causes of the actions brought by the said judgment claimants in said decree mentioned, was not executed between said defendant, the Greensboro Water Supply Company, and said City of Greensboro, until after the incorporation of the said Greensboro Water Supply Company, viz: near or at the time of the happening of the fires mentioned in the records of said suits upon which said judgments were brought and obtained as appears in said proceedings, all of which appears from the records in said suits, and the report of the special
(530) master, Clement Manly, in these proceedings mentioned, and both the mortgages of the Greensboro Water Company to said respondent, and of the Greensboro Water Supply Company to said complainant, were executed long prior to the execution of the contract between the said defendant, the Greensboro Water Supply Company, and the City of Greensboro, and the acts and defaults of the said defendant contrary to the terms of said contract could not be wrongs independent of contract or torts committed by the Greensboro Water Company or the Greensboro Water

Supply Company within the meaning of the section of the Code of North Carolina known as Section 1255, but were breaches of contract solely dependent upon the contract itself, with which the said Greensboro Water Company had no connection whatever.

7. The court erred in its decree aforesaid, for the reason that it appears in these proceedings that the judgment of the alleged judgment creditors in said decree mentioned was obtained upon suits brought for injuries alleged to be suffered by said judgment creditors, by reason of the negligent action or default of the defendant, the Greensboro Water Supply Company, under its contract between the City of Greensboro and said defendant, whereas such negligent action or default, as is set out and appears in the records in said suits of said judgment creditors, does not constitute a valid cause of action upon which judgment could be entered against said defendant so as to bind this complainant according to the law of the land as adopted and administered in this court and the other Federal Courts of the United States, and according to the law as administered in all the other courts of this country, both State and Federal, with the exception of the said State Courts of North Carolina; and that said right of action set out in said records in said suits is not given by any statute of the State of North Carolina, and therefore this court will not decide and enforce the validity of the invalid causes of action appearing in the records in said suits against this complainant or the other suitors and parties in this cause, who are entitled to the protection of the law as found and (531) applicable to suitors in this court.

8. And the court erred in said decree for the reason, as appears by the terms thereof, that it decided that the wrongs, acts or defaults of the said defendant, the Greensboro Water Supply Company, in said proceedings mentioned, were "torts committed" by the said defendant Company against the said judgment creditors or plaintiffs in those suits; whereas it appears from an inspection of the records in said causes that the wrongful act, defaults, neglects and omissions of the said defendant, the Greensboro Water Supply Company, which are charged as the subject of said suits, were only made and became such by the terms of the contract in said proceedings mentioned and sued upon, and the particulars breaches whereof are alleged, and could not be "torts committed" which entitled said judgment creditors to a lien prior to the lien of the mortgages in these proceedings mentioned under the terms of Section 1255 of the Code of North Carolina.

9. And the court erred in said decree, as appears from the terms thereof, in deciding that the form of the judgments or of the actions in the suits in which the said judgment of the judgment creditors in said decree mentioned, being in tort or *ex delicto*, made and constituted the causes of said action, "torts committed" within the meaning of the Section 1255 of the Code of North Carolina, in these proceedings referred to, whereas it appears from the said act itself that the causes of action which are given a preference under the terms of the act were to be "torts committed," viz., acts in the nature of torts, without respect to the form of action or pleading which might be adopted by the pleader in bringing said suit.

ARCHIBALD H. TAYLOR,
BYNUM & BYNUM,
Solicitors Complainant.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

PETITION OF THE GUARANTEE TRUST AND DEPOSIT COMPANY FOR AN ORDER ALLOWING AN APPEAL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(532) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO.

Guardian Trust and Deposit Company
vs.
Greensboro Water Supply Company. } In Equity.

Petition of the Guarantee Trust and Deposit Company, respondent, for an order allowing an appeal from the final decree heretofore entered in said case, to the United States Circuit Court of Appeals, for the Fourth Circuit.

The above named Guarantee Trust and Deposit Company, respondent, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause the 24th day of March, 1902, wherein and whereby it was ordered, adjudged and decreed that certain judgments of the judgment creditors, B. J. Fisher, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram & Company and Helen G. Brown, are entitled to priority of payment over and above the lien of the mortgages set out and described in the papers, writings and records in the proceedings filed in this cause (meaning

the mortgage made to said respondent by the Greensboro Water Supply Company in this proceedings mentioned) and that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of $25,000 with interest from January 14th, 1901, and to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of $3,200 with interest thereon from January 14th, 1901, and A. M. Scales, assignee of Hodgin, Pegram and Company, or his attorneys of record, the sum of $1,800, with interest thereon from January 14th, 1901, and to Helen G. Brown, or her attorneys of record, the sum of $3,000, with interest thereon from January 14th, 1901, etc., does hereby appeal from the said order and decree of March 24th, 1902, to the United
(533) States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed, and that a transcript of the papers, records and proceedings in said suit, upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit, and also that an order be made fixing the amount of security which the said respondent shall give and furnish for such appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals for the Fourth Circuit.

And your petitioner will ever pray.

ARCHIBALD H. TAYLOR,
BYNUM & BYNUM,
Solicitors for Respondent.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

RESPONDENT'S ASSIGNMENT OF ERRORS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(534) WESTERN DISTRICT OF NORTH CAROLINA,
AT GREENSBORO.

Guardian Trust and Deposit Company
vs.
Greensboro Water Supply Company. } In Equity.

Assignment of Errors upon Appeal of Guarantee Trust and Deposit Company, the Respondent.

The Guarantee Trust and Deposit Company, the respond-

ent in these proceedings mentioned, files the following assignment of errors upon which it will rely upon its appeal from the decree of the said Circuit Court of the United States, passed in this cause March 24th, 1902:

The said respondent assigns as error upon this appeal, the following, viz.:

1. The said court erred in deciding and decreeing that the judgment of B. J. Fisher for $25,000, of A. M. Scales, assignee of A. A. Hinkle for $3,200, of A. M. Scales, assignee of Hodgin, Pegram and Company for $1,800, and of Helen G. Brown for $3,000, against the Greensboro Water Supply Company, are entitled to priority of payment out of the fund, the proceeds of the sale of the property in this cause, over and above the lien of said respondent, trustee under the mortgage in these proceedings referred to.

2. The said court erred in ordering and decreeing that out of the moneys and funds now in the custody of this court arising from the sale of the property of the Greensboro Water Supply Company to the City of Greensboro, and held for distribution under the order of this court (535) that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of $25,000, with interest from the 14th day of January, 1901, the date of the docketing thereof in the Superior Court of Guilford County, North Carolina, to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of $3,200, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to A. A. M. Scales, assignee of Hodgin, Pegram, or his attorneys of record, the sum of $1,800, with interest thereon from the 14th day of January, 1901, the date of docketing thereof in the said Superior Court, said interest on the said several judgments to be at the rate of six per cent. per annum until paid, and in ordering that the costs both in the State Court and in said Circuit Court of the United States, incident to and on the several judgments, be likewise paid by the said receiver out of said fund, without reference to the lien or claim of said respondent or any allowance whatever of said respondent's claim.

3. The said court erred in not deciding that the said respondent was entitled to a lien under the mortgage made to it as trustee in said proceedings mentioned, for the full amount of the mortgage bonds of the Greensboro Water Supply Company issued and outstanding under said mortgage, with interest upon the principal of said bonds, accrued to date of said decr[illegible], viz.: interest equal to the

amount of the unpaid coupons maturing prior hitherto, and the due proportion of the next maturing coupon, viz.: $50,000 of said first mortgage bonds of the Greensboro Water Company with coupons, and that said lien was prior to the lien of all other parties and intervenors in the said cause, and especially prior to the lien of the said alleged judgment creditors, B. J. Fisher, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram and Company and Helen G. Brown, for the amounts in said decree of said court mentioned, any and all of them, and in not ordering and decreeing that the lien of the said respondent for the said amount of fifty thousand dollars, with interest at the rate of six per cent. from the first day of January, 1902, to the date of said de-
(536) cree, should be paid by the receiver in this cause to the said respondent, trustee as aforesaid, prior to the payment of the liens and claims of all the other parties and intervenors in this cause appearing, and particularly prior to the claims upon judgments or otherwise of the said alleged judgment creditors, B. *F.* Fisher, A. M. Scales, assignee of A. A. Hinkle, A. M. Scales, assignee of Hodgin, Pegram and Company and Helen G. Brown, in said decree mentioned.

4. And the said court erred in the terms of its said decree, for the reason that the said cause being matured and coming to a hearing upon the pleadings and the claim and demand of the said respondent as set out in its answer in these proceedings, and upon the claims and demands of all other parties and intervenors whatsoever, the said court did not allow the claim and demand of the said respondent for any sum whatsoever, and did not assign or give or determine a lien in favor of the said respondent upon the said fund in the hands of the court for distribution, either prior to the liens, claims and demands of the other parties and intervenors in this cause, or in any order and place whatsoever, and the said respondent was entitled to have the amount of its said claim and the lien for said amount upon the said fund in the hands of the court in these proceedings, both absolutely and with reference to the liens, claims and demands of all other parties and intervenors and claimants in these proceedings mentioned, determined and adjudged, and the effect of the terms of the said decree of the said court is to ignore the rights, claims and demands of the said respondent, and to refuse to it any and all relief whatsoever in the premises, contrary to the law applicable to its case.

5. And the court erred in the terms of said decree for
(537) the reason, that the said court had assumed and had

jurisdiction of the subject matter of the said suit, and of the parties to the said cause, upon and after the filing of the bill and amended bill of complaint of said Guardian Trust and Deposit Company, the complainant in said proceedings appearing, by reason of the citizenship of the parties to the cause, and for other reasons appearing upon the face of the proceedings in said cause, and the said respondent had the right to have the questions arising in said cause between it and the other parties to the cause, and especially between it and the said alleged judgment creditors, B. *F.* Fisher, A. M. Scales, assignee of A. A. Hinkle; A. M. Scales, assignee of Hodgin, Pegram and Company, and Helen G. Brown, fully tried, heard, and determined by this court without reference to or being affected or bound by the proceedings, adjudications and determinations of any State court whatsoever, and it was the duty of this court, in determining and deciding the questions between the said respondent and the said alleged judgment creditors or claimants, to have examined fully and for itself into the claims and demands of the said alleged judgment creditors, whether the same were valid against the said respondent, and, if valid, for what amount, and to have required full and affirmative proof of the same, according to the law and rules of evidence binding upon the Federal courts and this court, and to have allowed and given effect to the liens and claims of the said judgment creditors, and priority to the same over and at the expense of the lien and claim of the respondent, only if upon such proof and evidence taken and required, according to the law and rules of this court, the said claims and demands of the said alleged judgment creditors were found to be prior to the lien of the said respondent, trustee as aforesaid; but the said court, as appears by the terms of its said decree, and the other proceedings in said cause, did not examine for itself into the claims and demands (538) of the said judgment creditors to have their alleged judgments enforced against the respondent, and prior to and at the expense of the lien and claim of the said respondent, but decided, adjudged and determined the claims and demands of the said judgment creditors to be valid against the said respondent, and accorded them a lien prior to and at the expense of the right lien and claims of the said solely by reason and by force and effect of the terms and form of the judgment and decision of the Superior Court of Guilford county, North Carolina, in these proceedings appearing and set out, as certified by said Superior Court of Guilford county, contrary to the law binding upon this court and to its jurisdiction and consti-

tution, and contrary to the constitutional and lawful right of the said respondent to have the mutual issues, claims and demands between it and the said alleged judgment creditors fully tried, adjudged and determined by this court without reference to the judgment, opinion, determination or decision of the said Superior Court of Guilford county, North Carolina, or of any State court.

6. And the court erred in the terms of its decree aforesaid, for the reason that it appears, that the contract between the said Greensboro Water Supply Company and the City of Greensboro in these proceedings mentioned, the breaches of which, and of the obligations of said defendant under which contract were the causes of the actions brought by the said judgment claimants in said decree mentioned, was not executed between said defendant, the Greensboro Water Supply Company, and said City of Greensboro, until after the incorporation of the said Greensboro Water Supply Company, viz: near or at the time of the happening of the fires mentioned in the records of said suits upon which said judgments were brought and obtained as appears in said proceedings, all of which appears from the records in said suits, and the report of the special (539) master, Clement Manly, in these proceedings mentioned, and both the mortgages of the Greensboro Water Company to said respondent, and of the Greensboro Water Supply Company to said complainant, were executed long prior to the execution of the contract between the said defendant, the Greensboro Water Supply Company, and the City of Greensboro, and the acts and defaults of the said defendant contrary to the terms of said contract could not be wrongs independent of contract or torts committed by the Greensboro Water Company or the Greensboro Water Supply Company within the meaning of the section of the Code of North Carolina known as Section 1255, but were breaches of contract by the Greensboro Water Supply Company solely dependent upon the contract itself, with which the said Greensboro Water Company had no connection whatever.

7. The court erred in its decree aforesaid, for the reason that it appears in these proceedings that the judgment of the alleged judgment creditors in said decree mentioned was obtained upon suits brought for injuries alleged to be suffered by said judgment creditors, by reason of the negligent action or default of the defendant, the Greensboro Water Supply Company, under its contract between the City of Greensboro and said defendant, whereas such negligent action or default, as is set out and appears in the re-

cords in said suits of said judgment creditors, does not constitute a valid cause of action upon which judgment could be entered against said defendant so as to bind this respondent according to the law of the land as adopted and administered in this court and the other Federal Courts of the United States, and according to the law as administered in all the other courts of this country, both State and Federal, with the exception of the said State Courts of North Carolina; and that said right of action set out in said records in said suits is not given by any statute of the State of North Carolina, and therefore this court will not decide and enforce the validity of the invalid causes of action appearing in the records in said suits against this respondent or the other suitors and parties in this cause, who are entitled to the protection of the law as found and (540) applicable to suitors in this court.

8. And the court erred in said decree for the reason, as appears by the terms thereof, that it decided that the wrongs, acts or defaults of the said defendant, the Greensboro Water Supply Company, in said proceedings mentioned, were "torts committed" by the said defendant Company against the said judgment creditors or plaintiffs in those suits; whereas it appears from an inspection of the records in said causes that the wrongful act, defaults, neglects and omissions of the said defendant, the Greensboro Water Supply Company, which are charged as the subject of said suits, were only made and became such by the terms of the contract in said proceedings mentioned and sued upon, and the particulars breaches whereof are alleged, and could not be "torts committed" which entitled said judgment creditors to a lien prior to the lien of the mortgages in these proceedings mentioned under the terms of Section 1255 of the Code of North Carolina.

9. And the court erred in said decree, as appears from the terms thereof, in deciding that the form of the judgments or of the actions in the suits in which the said judgment of the judgment creditors in said decree mentioned, being in tort or *ex delicto*, made and constituted the causes of said action, "torts committed" within the meaning of the Section 1255 of the Code of North Carolina, in these proceedings referred to, whereas it appears from the said act itself that the causes of action which are given a preference under the terms of the act were to be "torts committed," viz., acts in the nature of torts, without respect to the form of action or pleading which might be adopted by the pleader in bringing said suit.

(541) 10. And the said court erred in said decree, as appears

from the terms thereof, inasmuch as it decided that this respondent and the holders of the bonds issued under the mortgage of the Greensboro Water Company to it, had exchanged the lien and obligation given by the terms of said deed of trust and bonds for a lien and obligation given under the terms of the mortgage from the Greensboro Water Supply Company to the complainant in these proceedings mentioned, dated July 1st, 1896, whereas it appears that this respondent was no party whatsoever to the suit of J. W. Middendorf et al. *vs.* Greensboro Water Company, and had no knowledge of the same, and did no act whatsoever to alter, substitute or affect in any manner whatsoever the lien and obligations of the mortgage made to it and the bonds issued thereunder, but that the sale was made by the court in that case, expressly subject to all the rights and liens of this respondent for the benefit of said bondholders without alteration, change or diminution in any particular, and that while it appears that certain of the holders of said bonds were aware of said proceedings in last mentioned suit, and made no objection to the manner in which they were conducted, yet no one of said holders in any way offered or agreed to exchange or substitute the bond or bonds owned by him or them for the obligations of the Greensboro Water Supply Company or any company, but, on the the contrary, said holders were informed by the advertisement of the court in said proceedings that the decree of sale by the court in no way altered, impaired or diminished the obligation of the Greensboro Water Company to them, and none of said holders had any right to interfere with the proceedings in said last mentioned suit, inasmuch as no default had occurred under the terms of said bonds, nor did they take any part in said proceedings in the nature of the exchange of the bonds held by them for the securities of the newly organized company, the Greensboro Water Supply Company, or from which such exchange could be legally inferred, and the negotiable nature of said bonds effectually (542) prevented any such action being taken, except by the surrender and exchange of the obligation of the one company for that of the other, the defendant, and that as to your respondent, and the holders of the bonds of the Greensboro Water Supply Company, the statute of the State of North Carolina expressly provided that the dissolution therein referred to (even if said statute had any application to such case, which said respondent denies) should not take effect so as to relieve such corporation from its responsibility and liability to its creditors, but preserve its existence for that purpose, and therefore the holders of the obligations of the Greensboro Water Com-

pany could not be made responsible for the torts committed by another Company with whom they had no contractual or other relation whatsoever, which is erroneously effected by the terms of the decree in this case.

ARCHIBALD H. TAYLOR,
BYNUM & BYNUM,
Solicitors for Respondent.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(543) WESTERN DISTRICT OF NORTH CAROLINA.
AT GREENSBORO.

Guardian Trust and Deposit Company
vs.
Greensboro Water Supply Company. } In Equity.

Upon reading and filing the petitions of the Guardian Trust and Deposit Company, complainant, and of the Guarantee Trust and Deposit Company, the respondent in these proceedings mentioned, for an order allowing *allowing* an appeal, and the assignment of errors herein made and filed by the said complainant and respondent, it is ordered that an appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the final decree heretofore entered and filed herein on the 24th day of March, 1902, be and the same is hereby allowed, and that a transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals for the Fourth Circuit.

It is further ordered that the amount of the security on appeal herein to be furnished by the said complainant and respondent be, and the same is hereby, fixed at the sum of $300, and upon the making and filing with the clerk of this court of a good and sufficient bond in said sum by the said Guardian Trust and Deposit Company and the Guarantee Trust and Deposit Company, all further proceedings, including execution on said final decree, be superseded and stayed until the final determination of said appeal to the said United States Circuit Court of Appeals and until the further order of this court.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

APPEAL BOND.

(544) Know all men by these presents, that we, The Guarantee Trust and Safe Deposit Company of Philadelphia, Pennsylvania, and the Guardian Trust and Deposit Company of Baltimore, as principals, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto B. J. Fisher, A. M. Scales, Assignee of A. A. Hinkle, A. M. Scales, Assignee of Hodgin, Pegram and Company and Helen G. Brown in the full and just sum of three hundred dollars ($300.00) to be paid to the said B. J. Fisher, A. M. Scales, Assignee of A. A. Hinkle, A. M. Scales, Assignee of Hodgin, Pegram and Company and Helen G. Brown, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of April in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately at a session of the Circuit Court of the United States for the Western District of North Carolina, in a suit depending in said court between the said B. J. Fisher, A. M. Scales, Assignee of A. A. Hinkle, A. M. Scales, Assignee of Hodgin, Pegram & Company and Helen G. Brown, judgment creditors mentioned in the said entitled "Guardian Trust & Deposit Co., Complainant *vs.* Greensboro Water Supply Co., Defendant," and the said Guarantee Trust and Safe Deposit Company and the Guardian Trust and Deposit Company, Mortgagee therein mentioned a judgment was rendered against the said Guarantee Trust and Safe Deposit Company and the Guardian Trust and Deposit Company, Mortgagees aforesaid, and the said Guarantee Trust & Deposit Company and the Guardian Trust & Safe Deposit Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said B. J. Fisher, A. M. Scales, Assignee of A. A. Hinkle, A. M. Scales, As-
(545) signee of Hodgin, Pegram & Company and Helen G. Brown, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Fourth

Circuit, to be holden at Richmond, on the first Tuesday in November, 1902.

Now the condition of the above obligation is such, that if the said Guarantee Trust & Safe Deposit Company and the Guardian Trust and Deposit Company shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue

GUARANTEE TRUST & SAFE DEPOSIT CO.
By H. J. DELANEY, V. P. [Seal]

Attest:

JOS. E. BOYDEN, Secty. pro tem.

THE GUARDIAN TRUST & DEPOSIT CO.
By H. CLINTON MERRYMAN, [Seal.]
2 V. Prest.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
Per EDWIN WARDIELD,
President.

Attest:

HARRY NICODEMUS, Secretary.

Sealed and delivered in the presence of—

MATHIAS F. REECE, Secty.

Approved by—

JAS. E. BOYD, U. S. Judge.

Endorsed:

Filed in this office, April 26, 1902.

SAM'L L. TROGDON, Clerk.

CITATION.

(546) UNITED STATES OF AMERICA, } *ss:*

The President of the United States to B. J. Fisher, A. M. Scales, assignee of A. A. Hinkle; A. M. Scales, assignee of Hodgin, Pegram & Co., and Helen G. Brown—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the

Fourth Circuit, to be holden at Richmond on the eighteenth day of May, 1902, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Western District of North Carolina, at Greensboro, wherein the Guardian Trust and Deposit Company is complainant and the Greensboro Water Supply Company and you are respondents, and to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James E. Boyd, Judge of the Circuit Court of the United States for the Western District of North Carolina, this 19th day of April, in the year of our Lord one thousand, nine hundred and two, 1902.

JAS. E. BOYD,
U. S. Judge.

We accept service of the within citation of appeal.

JOHN N. WILSON,
Atty. for Helen G. Brown.
JOHN N. STAPLES,
A. L. BROOKS,
of counsel for B. J. Fisher.
A. L. BROOKS,
of counsel for A. M. Scales, assignee of Hodgin, Pegram & Co. and of A. A. Hinkle.

(Endorsed:)

Filed in this office April 19, 1902.

SAM'L L. TROGDON, Clerk.

MOTION FOR ORDER TO MAKE THE GORRELL JUDGMENT PRIOR TO OTHER JUDGMENTS, AND ORDER CONTINUING SAME.

(547) IN THE CIRCUIT COURT UNITED STATES, WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

Guardian Trust and Deposit Company,
vs.
Greensboro Water Supply Company.
} In Equity.

The Guardian Trust and Deposit Company come into court and this day move to correct the judgment and decree heretofore rendered in this cause, and to declare that the judgment in favor of Charlotte Gorrell versus the Greensboro Water Supply Company, which was duly

docketed in the Superior Court of Guilford county prior to the rendition or docketing of any of the other judgments mentioned in said decree, shall be declared as having priority over any of the judgments set out in the said decree.

This the 14th day of April, 1902.

GUARDIAN TRUST & DEPOSIT COMPANY,
By ARCHIBALD H. TAYLOR and
BYNUM & BYNUM,
Attorneys.

The clerk will enter of record the above motion and the same is continued for hearing to await determination of above case in the Circuit Court of Appeals.

JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office April 14, 1902.

SAM'L L. TROGDON, Clerk.

ORDER EXTENDING TIME FOR FILING RECORD.

UNITED STATES OF AMERICA. IN THE CIRCUIT COURT OF THE
(548) UNITED STATES FOR THE WESTERN DISTRICT OF
NORTH CAROLINA. AT GREENSBORO,
NORTH CAROLINA.

Guardian Trust and Deposit Company, Complainant,
vs.
The Greensboro Water Supply Company, Defendant.

In the above entitled cause, it having been on the 19th day of April, 1902, ordered that the record on the appeal in the above cause should be filed in the office of the Circuit Court of Appeals in Richmond, Virginia, on the 18th day of May, 1902. and it now appearing to the court that the clerk of this court cannot have the record prepared and forwarded so as to be filed on the said date.

It is now ordered and adjudged that the time for filing the said record on appeal with the Clerk of the United States Circuit Court of Appeals at Richmond, Virginia, be extended until the 15th day of June, 1902, at 12 M., when the said record on appeal shall be filed as required by law.

This does not waive the right to have put in record

certain agreements as to parts thereof now in hands of R R. King, Esq.

A. L. BROOKS,
Solicitor for Fisher, Scales, Assignee,
& Hodgin, Pegram & A. A. Hinkle.
JOHN N. WILSON,
Attorney for Helen G. Brown.
BYNUM & BYNUM,
Attorneys for Defts.
JAS. E. BOYD,
U. S. Judge.

Endorsed:

Filed in this office May 16th, 1902.

SAM'L L. TROGDON, Clerk.

ORDER TO TRANSMIT RECORD.

(549) UNITED STATES OF AMERICA. WESTERN DISTRICT OF NORTH CAROLINA. IN THE CIRCUIT COURT, FOURTH CIRCUIT, AT GREENSBORO.

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the case of The Guardian Trust and Deposit Company *vs.* The Greensboro Water Supply Company, together with all things thereunto relating, be transmitted to the said Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Test:

{ Seal of the Court. }

SAM'L L. TROGDON,

Clerk.

CLERK'S CERTIFICATE.

(550) I, Sam'l L. Trodgon, Clerk of the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, in said District, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the Guardian Trust and Deposit Company *vs.* The Greensboro Water Supply Company, as fully appears from the original papers and records in this office; and that the agreement of counsel in regard to the insertion of certain papers from the case of Mittendorf *vs.* Greensboro Water Company and the papers herein inserted under said agreement are true and perfect copies of the original papers now on file in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Greensboro, in said District, on this 14th day of June, A. D., 1902.

{Seal of the Court.}

SAM'L L. TROGDON,
Clerk of the said Circuit Court.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

GUARDIAN TRUST & DEPOSIT Co. and GUARANTEE TRUST & Deposit Co., Appellants,
versus
B. J. FISHER, A. M. SCALES, Assignee of A. A. HINKLE; A. M. Scales, Assignee of Hodgin, Pegram & Co., and Helen G. Brown, Appellees.
} No. 456.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

June 14, 1902, transcript of record is filed, and cause docketed.
Same day, appearance of A. H. Taylor and Wm. P. Bynum, Jr., for the appellants, orders filed.

Order Extending Time for Filing Record in U. S. Circuit Court of Appeals.

Filed June 14, 1902.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, North Carolina.

THE GUARDIAN TRUST AND DEPOSIT COMPANY, Complainant,
vs.
THE GREENSBORO WATER SUPPLY COMPANY, Defendant.

In the above entitled cause, it having been on the 19th day of April 1902 ordered that the record on the appeal in the above cause should be filed in the office of the circuit court of appeals in Richmond, Virginia, on the 18th day of May 1902, and it now appearing to the court that the clerk of this court cannot have the record prepared and forwarded so as to be filed on the said date:

It is now ordered and adjudged that the time for filing the said record on appeal with the clerk of the United States circuit court of appeals at Richmond, Virginia, be extended until the 15th day of June 1902, at 12 m. when the said record on appeal shall be filed as required by law.

This does not waive the right to have put in record certain agreements as to parts thereof now in hands of R. R. King, Esq.

A. L. BROOKS,
Solicitor for Fisher, Scales, Assignee, & Hodgin, Pegram, & A. A. Hinkle.
JOHN N. WILSON,
Att'y for Helen G. Brown.
BYNUM & BYNUM,
Att'ys for Defendants.
JAS. E. BOYD, U. S. Judge.

August 22, 1902, twenty copies of the printed record is filed.
Aug. 25, 1902, appearance of John N. Staples, A. L. Brooks and John N. Wilson for the appellees, order- filed.

Addenda to Record.

Agreement of Counsel.

Filed Nov. 8, 1902.

In the United States Circuit Court of Appeals, Fourth Circuit.

GUARDIAN TRUST AND DEPOSIT COMPANY ET AL., Trustee for Bondholders of the Greensboro Water Supply Company, Appellants,
vs.
B. J. FISHER ET AL., Appellees.
} No. 456.

Appeal from Circuit Court for the United States for the Western District of North Carolina.

It is agreed between counsel for the several parties to this cause that the annexed copies of the papers referred to in the master's report as Exhibit C and Exhibit J, S, G, No. 1, shall be filed and considered at the trial of the above entitled cause in the United States circuit court of appeals as part of the record in said cause, to the same effect as if the same had been duly certified by the clerk of the circuit court and printed as part of said record. This the fifth day of November, 1902.

A. H. TAYLOR,
HUGH L. BOND, JR.,
WM. P. BYNUM, JR.,
Att'ys for Appellants.
A. L. BROOKS,
JOHN N. STAPLES,
Att'ys for the Appellees.

Endorsed: Filed in this office Nov. 6th, 1902. Sam'l L. Trogdon, clerk.

EXHIBIT No. 1, J. S. G.

List of first mortgage 6 per cent. 1918 gold bonds of the Greensboro Water Company (N. C.) deposited with the Guardian Trust & Deposit Company of Baltimore City under terms of agreement dated December 15th, 1900.

Depositors.	Nos. of Bonds.	Amount.
Miss Mary E. Rogers	2, 6, 28	$3,000
Safe Deposit & Trust Co	3, 5	2,000
Jno. S. Gittings	10	1,000
Rob't W. Smith, agent	11	1,000
Eleanor A. Chatard	12	1,000
Miss Mollie Bosley	13	1,000
Jno. S. Gittings, att'y	15	1,000
Mrs. Anna F. Byrn	16, 17, 18	3,000
Harry J. Matthews	19	1,000
Julian Taylor	20	1,000
W. A. S. Norris	21, 25	2,000
Rebecca N. Howard	23, 26	2,000
Charlotte R. Smith	24	1,000
Mrs. Rachel H. Bosley	27	1,000
Mrs. A. M. Winter	29, 36, 45, 46	4,000
C. W. Ridgely & Son	31, 33	2,000
Henry C. Merryman	32	1,000
Eliz. H. Morrison	34	1,000
Clara L. Curran	37, 38	2,000
Wm. T. Howard	39, 40, 41, 42, 43	5,000
Mrs. A. M. Belt	47, 48	2,000
Chas. H. Wyatt	49	1,000
Anne Carolina Brencker, by Wm. C. Shaw, att'y, Macon, Ga.	50	1,000
W. C. Seddon & Co. (representing Geo. Wood, owner).	1, 4, 7, 8, 9, 14, 22, 30, 35, 44.	10,000
		$50,000

All bonds carrying August, 1902, and subsequent coupons.

Baltimore, October 31st, 1902.

The within is the list of the bonds of the Greensboro Water Co., deposited by the holders with the Guardian Trust & Deposit Co., referred to by me in my testimony before the master, Clement Manly, and which I filed with him as Complainants' Exhibit J. S. G. No. 1, as appears on the records, page 88, in the United States court of appeals.

JOHN S. GITTINGS.

November 3rd, 1902.

EXHIBIT C.

Guarantee Trust and Safe Deposit Company, Deed from Greensboro Water Company.

This indenture, made the tenth day of January, A. D. 1888, between the "Greensboro Water Company," a corporation duly organized and existing under the laws of the State of North Carolina, hereinafter termed "The Water Company," party of the first part, and the "Guarantee Trust and Safe Deposit Company," a corporation duly organized and existing under the laws of the State of Pennsylvania, hereinafter termed "The said Trust Company," party of the second part.

Whereas, the said water company is authorized and empowered to construct and operate water works for supplying water to the citizens of Greensboro, North Carolina and vicinity, and for that purpose to borrow money and to issue bonds and to secure the payment thereof by mortgage on its real and personal property, rights, privileges and franchises; and whereas, the stockholders of the said water company, at a regular meeting held in pursuance of the provisions of its letters of incorporation on the 30th day of December, A. D. 1887, at its office in Greensboro, North Carolina, did pass the following resolution by a unanimous vote, to-wit:

Resolved, That the stockholders of the Greensboro Water Company, recognizing the necessity and being desirous of borrowing money to aid in the building and equipment of its works, do hereby authorize and empower the board of directors of said water company to take such necessary and legal steps as may be in their discretion, requisite to obtain a loan of fifty thousand dollars; said loan to be secured by a first mortgage or deed of trust on the works and other real and personal property, rights, privileges and franchises, revenues and appurtenances, whether now owned or possessed or hereafter to be acquired by said water company said mortgage to be for such time and at such rate of interest, not exceeding six per cent., and to contain such provisions and conditions as to the board of directors may seem best.

Whereas, in accordance with such resolution of the stockholders, the board of directors of said water company did on the said last mentioned day, at a special meeting pass the following resolution, to-wit:

Resolved, That the president of this company, in pursuance of the authority of the stockholders be and he is hereby authorized to prepare for issue fifty thousand dollars of first mortgage six per cent. bonds, to be of the denomination of one thousand dollars each, payable thirty years from February 1st, 1888, with coupons attached payable semi-annually on the first days of August and February in each year up to and including the first day of February, 1918, at the office of the Guarantee Trust and Safe Deposit Company, of Phila-

delphia, Pennsylvania, or at such other fiscal agency or agencies as the board of directors may hereafter appoint, and that the president be and he is hereby authorized and empowered to mortgage to the aforesaid, The Guarantee Trust and Safe Deposit Company of Philadelphia, Pennsylvania, all of the real and personal property, rights, privileges and franchises, revenues and appurtenances of the said water company, whether now owned or possessed, or hereafter to be acquired as security for said fifty bonds of one thousand dollars each; "said bonds to be free from United States and State and municipal taxes, to be paid, principal and interest in gold coin of present standard value; and to stand ratably and equally secured according to their respective amounts without any preference in respect to their priority of issue; and to be signed by the president and the secretary and treasurer of said Greensboro Water Company, with the corporate seal attached, and duly authenticated by a certificate of the trustee endorsed thereon, said bonds and mortgage may contain such other and further stipulations, agreements, provisions and conditions, not inconsistent with the foregoing as the said president may deem best.

Whereas, it is inteded that each of the said bonds shall be of the denomination of one thousand dollars and shall be in the words and figures following, subject only to necessary variations, as to the distinguishing number thereof:

No. —. $1,000.00.

United States of America.

State of North Carolina.

Greensboro Water Company, of Greensboro, North Carolina.

Six Per Cent. First Mortgage Bond.

The Greensboro Water Company, a corporation organized under the laws of the State of North Carolina, for value received, promises to pay to the Guarantee Trust and Safe Deposit Company of Philadelphia, Pennsylvania, or bearer, the sum of one thousand dollars, lawful money of the United States of America on the first day of February, nineteen hundred and eighteen at the office of the Guarantee Trust and Safe Deposit Company in the city of Philadelphia, with interest thereon at the rate of six per cent. per annum payable semi-annually, on the first days of August and February in each year at the office of the said Guarantee Trust and Safe Deposit Company, in the city of Philadelphia, Pennsylvania, on the presentation and surrender of the annexed coupons as they severally become due, and in case of the non-payment of any instalment of interest when due as witnessed by the said coupons and presented for payment at the office of the said Guarantee Trust and Safe Deposit Company, the same shall draw six per cent. interest per annum from such presentation until paid, and should any such remain un-

paid for six months after becoming due, the principal of this bond shall become due and payable at the option of the holder, and proceedings may be had at once, to enforce the payment thereof. This bond is one of a series of the same tenor and date amounting in all to the aggregate sum of fifty thousand dollars, numbered from one to fifty inclusive; the payment of which, principal and interest, is secured by trust deed or first mortgage upon the water works property, real and personal, franchise, rentals, rights and privileges of the said Greensboro Water Company, now owned and possessed or which may hereafter be acquired by the said Greensboro Water Company, which is duly executed and delivered to said Guarantee Trust and Safe Deposit Company in trust for the benefit of the holders of said bonds.

This bond is to be free from any deduction for United States, State or municipal taxes and to be paid, principal and interest, in gold of the United States of America of present standard and value.

In witness whereof the said Greensboro Water Company has caused this instrument to be subscribed by the president and secretary and treasurer and its corporate seal to be affixed thereto; and the coupons hereto attached to be signed by its president on the 10th day of January A. D., 1888.

THOMAS B. KEOGH, President.

[L. S.] FRED'K B. HUBBELL,
Sec'y and *Pres.*

Trustee's Certificate.

The Guarantee Trust and Safe Deposit Company of Philadelphia, Penn., hereby certifies that this bond is one of the series, amounting in the aggregate to the sum of fifty thousand dollars, which bonds are secured by the deed of trust (or mortgage), therein mentioned.

Whereas, it is intended that each of the said coupons shall be in the words and figures following, subject only to the necessary variations as to the distinguishing numbers and dates of payment.

$30.00. 1.

The Greensboro Water Company will pay to the bearer, August 1st, 1888, thirty dollars at the office of the Guarantee Trust and Safe Deposit Company, of Philadelphia, Pa., being six months' interest on its bond No. —.

THOS. B. KEOGH, President.

Now, therefore, this indenture witnesseth:

That in consideration of the premises and of the further sum of one dollar lawful money of the United States of America, well and truly paid to the party of the first part before the ensealing and delivery of these presents, by the party of the second part, the receipt

of which is hereby acknowledged, and in exercise of the statutory power or powers in this behalf given to the said water company as hereinbefore mentioned, and all other power therein, in that behalf, enabling, the Greensboro Water Company doth hereby grant, sell, alien, assign, remise, release, convey and transfer unto the Guarantee Trust and Safe Deposit Company, its successor or successors, all that certain tract of land in the county of Guilford, State of North Carolina, on the waters of North Buffalo creek, adjoining the lands of Willis Sykes and others, described and bounded as follows:

Beginning at a stone on north side of Tail Race bank, and the south bank of the Cape Fear and Yadkin Valley railroad running thence north 43 degrees 45 minutes one hundred and eighty (180) feet to a stone in Sykes' old line; thence south 35 degrees west fifty (50) feet to a stone, Sykes' corner on north side of old Martinsville road; thence north 44 degrees 35 minutes west with said road seventy-three (73) feet to a stone, corner in Sykes' line; thence with Sykes' line west 8 degrees north thirty-six (36) feet to a stone in Sykes' line; thence south 47 degrees west 165 feet to a stone in Caldwell's field; thence south 43 degrees east 282 feet to a stone; on the west bank of the head race above the mill race, thence up the said head race on west bank twenty-five (25) feet from the center thereof, to the pond, thence around the pond at the water's edge, at high water mark, when there is a full head and the water running over the two dams, of the same height as when used by the former owner, W. A. Caldwell, but not to overflow the north bank of the creek at Sandridge's line to the head race, and with the head race to the north bank of the old ditch at a point twenty-five (25) feet from its center; thence up said ditch to where it leaves the channel of North Buffalo creek, and up the north bank of said creek twenty-five (25) feet from its center to Sandridge's line; thence south with same to center of the creek at McKnight's and Sandridge's corner; thence with McKnight's line to a point twenty-five (25) feet from the water's edge on the south bank of said creek; thence down the south bank twenty (20) feet from the water's edge to a point ten (10) feet below the upper dam; thence across the creek to a point on the south bank of the old ditch twenty-five (25) feet from its center, and down the same at a like distance from its center to a point ten (10) feet below the second or lower dam; thence across the old ditch ten (10) feet below said dam to a point on the east bank of the head race twenty-five (25) feet from its center; thence down said head race twenty-five (25) feet from its center to the end near the mill house and thence down the tail race twenty-five (25) feet from its center to Henry H. Tate's line; and thence with said Tate's line to his northeast corner in Mrs. Gilmer's line, thence north with Mrs. Gilmer's line a few feet to Mrs. Oakley's corner in Mrs. Gilmer's line; thence west with Mrs. Oakley's line to the north bank of the tail race, to Sykes' new line (in deed Feb. or March, 1883), thence up the north bank of the tail race with Sykes' new line to the place of beginning, containing ten acres more or less.

Also all and singular the water works of the said water company, or which the said water company is by law authorized to construct, now, or hereafter constructed, and all the property real and personal of said water company, including all dams, reservoirs, basins, right-of-way, water privileges and pipes, hydrants and fire plugs owned or acquired or hereafter to be owned or acquired by the said water company or its successors, for use in connection with said water works or any part thereof; or with the business of the same; including also all machinery, tools, implements and materials for constructing, operating, repairing or replacing the said water works or any part thereof; or any of the equipments and appurtenances of said water works or any part thereof; hitherto or hereafter acquired; including also all revenues, rates, rentals, tolls, sums of money and income arising or to arise from the said water works or other premises hereinbefore expressed to be conveyed, or any of them; and also all corporate or other franchises, rights and privileges connected with or relating to said water works; or to the construction, maintenance and use of said water works, or otherwise belonging to said water company.

To have and to hold all and singular the above mentioned water works together with all the premises, property, rights and privileges and franchises hereinbefore assigned or intended so to be, with the appurtenances unto and to the use of the said Guarantee Trust and Safe Deposit Company of Philadelphia, Pa., its successor or successors forever.

In trust, however, for the person or persons, body politic or corporate who shall become the holder or holders of said bonds, or any of them; subject to the terms and stipulations of said bonds, and it is hereby expressly agreed and declared that the said Guarantee Trust and Safe Deposit Company and its successors shall stand possessed of all interest in all and singular the premises hereinbefore expressed to be conveyed, upon and for the trusts, interests and purposes following, that is to say:

First. The said water company hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these presents, to be enforced thereon; and not to commit or suffer any waste thereon.

Second. The said water company, its successors or assigns, shall and will punctually pay the holders of the bonds aforesaid, intended to be hereby secured or any that may at any time be accepted in lieu, renewal or substitution of the same respectively, the interests thereon when and as the same shall become due and payable according to the terms and conditions in the said bond set forth and contained; and shall and will also whenever the principal sum of the said bond shall become due and payable, fully and entirely pay, satisfy and discharge the whole of the said bonds, both principal and interest, without further delay and without any deduction either from the said principal or interest, for any tax or taxes imposed

thereon by the laws of the State of North Carolina or of the United States, for State, municipal or United States purposes, which the said water company is or may be required by the said laws to retain therefrom, the said water company hereby agreeing to pay the same.

Third. Until default as hereinafter described, in the principal or interest, in the said first mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the said water company, the said water company shall possess, operate, maintain and enjoy the water works and all rights, franchises and property of every kind, with the appurtenances included in the mortgage, and collect and receive and use the rents, tolls or issues, income and profits thereof.

Fourth. If there shall be any default in the payment of the interest of the bonds hereby secured or in the agreements or conditions to be kept and performed by the said water company, and such default shall continue during six consecutive months; or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter, during the continuance of such default, the said trustee, its successor or successors in said trust, at the request of the holders of a majority in value of said bonds, outstanding, may personally or by its or their attorney or agent, upon proper indemnity, enter upon, take, possess, maintain and operate said water works, and all its franchises, property and appurtenances of every description, belonging or appurtaining to said water company; and may make any necessary alterations in, and addition thereto, and collect and receive the rents, tolls, issues, income and profit thereof; and after paying all taxes, assessments and liens superior to the lien created by these presents and all proper expenses of constructing, operating and maintaining said water works, including the compensation of said trustee, shall apply the remainder as follows, namely:

a. To pay any accrued interest remaining unpaid on any of the said bonds, upon the presentation of the coupon for such unpaid interest, such coupons to be paid in the order of their presentation.

b. To the payment of the principal of the said bonds if the same is then due, or if the holders of a majority in value of said bonds outstanding, shall elect that the same be considered due, but in case, said principal is due or elected to be considered due, the remainder shall be applied to the payment of interest and principal without preference.

c. If said principal is not due, or elected to be considered not due, as aforesaid, then the net proceeds of the water works after payment of interest on all bonds in order of preference, and of all other interest bearing indebtedness purtaining to said water company, shall be applied to a sinking fund for the purpose of the purchase and cancellation of the said first mortgage bonds at a price not exceeding par and accrued interest and for the ultimate payment of said last named bonds.

d. But, and if, the earnings of the said water works, after the payment of the expenses of operating and maintaining the same and all proper charges, are sufficient to pay the interest on the bonds hereby secured when and as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having possession as aforesaid, shall surrender and restore the water works, with all rights, franchises and property of every kind purtaining to the same, and all additions thereto and extensions thereof, and shall deliver up all moneys, bills, accounts, claims, and demands of every kind and nature purtaining to said water works, to the water company, its successors or assigns, who shall possess and enjoy the same subject, however, to the provisions of this mortgage.

e. Provided however, that any default may be waived by the written assent thereto of the holders of a majority in value of bonds outstanding; but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening, and the provisions of sections four and five are subject to this proviso.

Fifth. If there shall be any default as described in section four, and the same is not waived as provided for in the same section, then and at any time thereafter, during the continuance of such default, the said trustee, its successor or successors in said trust shall, upon the request in writing, of the holders of a majority in value of the said first mortgage bonds outstanding with indemnity for expenses liable to be incurred; with or without entry, sell the said property, real and personal, and said franchise, rights and all property of any description, then composing or purtaining to said water works, as hereinbefore more fully set forth, at public auction, in the city of Philadelphia, Penn., free and discharged from all said trusts, to the highest and best bidder; first giving at least six weeks' notice of such intended sale by publication, to be made at least once in each week in some newspaper printed in the city of Philadelphia, Pa., and in the city of Greensboro, North Carolina; and shall and will, upon such sale being made, grant and convey the water works, premises, estates, property and franchises so sold to the purchaser or purchasers thereof; and such sale and conveyance made as aforesaid shall be a perpetual bar at law and in equity, to the said water company, and all persons claiming by, through or under the said water company; the net proceeds after deducting all proper charges and expenses, shall be applied without preference to the payment of principal and interest of the first mortgage bonds hereby secured; and any surplus remaining shall be paid to the said water company, its successors or assigns; or to each person or corporation, as may be lawfully entitled to receive the same. And it is especially covenanted and agreed that any sale that may be made under the provisions hereof, whether by the said trustee or under the decree of any court having competent jurisdiction, the purchaser shall be entitled to use in payment of the pur-

chase money, the bond secured hereby, as cash to the extent of the dividend to which said bonds shall be entitled from the proceeds of such sale, and it is further expressly covenanted and agreed by the said water company, for itself, its successors or assigns, that it will and does hereby waive the benefit of any valuation, appraisement redemption, stay or extension laws in force or which may hereafter be enacted.

Sixth. If the said water company shall pay the principal and the interest of all the first mortgage bonds hereby secured which may be issued according to the tenor thereof, this mortgage and all the said bonds shall be void, otherwise of full effect and virtue.

Seventh. The said water company and its successors and assigns shall from time to time and at all times hereafter and as often as thereunto requested by the said trustee its successor or successors in said trust execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law, for the better assuring unto the said trustee, its successor or successors in the trust hereby created, upon the trusts herein expressed, the water works and equipments and appurtenances hereinbefore mentioned, or intended so to be now, and hereafter composing or pertaining to the said water works; and all additions thereto, and extensions thereof as by the said trustee, its successors in said trust, or by its, his or their counsel, learned in the law, shall be reasonably advised, desired or requested.

Eighth. And it is hereby further covenanted and agreed, that the trusts created by this instrument are accepted upon the express condition, that the trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the said water company to retain or be in possession of the water works, estate and premises hereby mortgaged, or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall the trustee be or become liable or responsible for any destruction, deterioration, (determination), loss, injury or damage which may be done or occur to the water works estate hereby mortgaged, or agreed or intended so to be, either by the said water company or its agent or servants, or by any other person or persons who-soever; nor shall the trustee be in any (way) responsible for the consequences of any breach of the said water company of any of the covenants herein contained, nor liable to see the application of the proceeds of any of the bonds secured hereby, nor of any act of the said water company or its agents or servants, nor for any failure to file this instrument as a chattel mortgage, nor shall the trustee be held liable for any act, default or misconduct of any agent or agents, or persons employed by it, unless chargeable with culpable negligence in the selection or continuance of their employment; nor shall the trustee be answerable except for his own wilful default or gross neglect; and in case the trustee shall enter into possession of said mortgaged premises, and operate the same as hereinbefore provided, it shall be indemni-

fied out of the funds and property which shall come into its hands as aforesaid, for all claims and demands against it arising from negligence, carelessness or misconduct of its officers, agents and employees. And in all cases, the trustee shall be authorized to pay such reasonable compensation as it may deem proper to attorneys, servants and agents whom it may reasonably employ in the management of the trust, and the trustee shall be entitled to and shall (receive) just compensation for all services it may render in connection with the trust, to be paid by the said water company out of the estate; and the trustee may resign from the trust by notice in writing to the said water company, and to all known bondholders, at least thirty days before such resignation shall take effect (or such shorter time as may be accepted, as sufficient notice), and upon the execution and delivery, if such shall be required of the deed of conveyance and transfer to a successor in the trust.

In witness whereof and in pursuance of the resolutions of the stockholders heretofore made and by the instructions of the board of directors the Greensboro Water Company has caused its corporate seal to be affixed hereto and these presents to be signed by its president and attested by its secretary and also signed by its secretary and treasurer.

GREENSBORO WATER COMPANY,
By THOMAS B. KEOGH, President,
FRED B. HUBBELL, Sec'ty and Treas.
JAMES E. BOYD, Director.

Attest: FRED B. HUBBELL. [SEAL.]

The Guarantee Trust and Safe Deposit Company of Philadelphia, Pa., in token of its acceptance of the foregoing trusts has caused its corporate seal to be affixed hereto and these presents to be signed by its president and attested by its secretary.

GUARANTEE TRUST & SAFE DEPOSIT COMPANY.
[L. S.] THOMAS COCHRANE, President.

Attest: JOHN JAY GILROY, Secretary.

STATE OF NORTH CAROLINA, County of Guilford, } ss:

Be it remembered that on the 10th day of January, A. D., 1888, before me Albert A. Holton, clerk of the superior court for said county personally appeared Thomas B. Keogh, president of the Greensboro Water Company, and being duly sworn, deposeth and sayeth that he was personally present at the execution of the foregoing written indenture or deed of conveyance and trust, or mort-

gage and saw the common seal of the said corporation duly affixed thereto, and that the seal affixed thereto is the common and corporate seal of the Greensboro Water Company; and that the foregoing indenture, or deed of conveyance in trust, was duly signed, sealed and delivered by and as and for the act and deed of the said Greensboro Water Company for the uses and purposes therein mentioned; and that the name of this deponent subscribed to the said deed as president of said corporation, in attestation of the due execution and delivery of the said deed is of this deponent's own proper and respective handwriting.

Subscribed and sworn to the day and year last aforesaid before me.

THOMAS B. KEOGH.

Let said deed and this certificate be registered.

ALBERT A. HOLTON,
Clerk of the Superior Court.

Filed for registration five thirty o'clock p. m., January 28th, 1888.

J. W. CAUSEY.
Register of Deeds.

Recorded in Record of Mortgages Book 72 at pages 653 *et seq.*, in the office of the register of deeds for Guilford county, N. C.

Clerk's Certificate.

I, S. L. Trogden, clerk U. S. circuit court for the western district of North Carolina at Greensboro, in said district, do hereby certify that the foregoing is a true, full and perfect copy of the agreement of counsel now on file in this office; and a true, full and perfect copy of the copies of exhibits filed in this office with said agreement and referred to therein.

[SEAL.]

SAM'L L. TROGDON,
Clerk of U. S. Circuit Court.

Nov. 10, 1902, (November term 1902) cause came on to be heard and is argued before Judges Goff, Purnell and Waddill by counsel, and submitted.

Order for a Reargument.

Filed and Entered Feb. 10, 1903.

United States Circuit Court of Appeals, Fourth Circuit.

GUARDIAN TRUST & DEPOSIT CO. ET AL., Appellants,
vs.
B. J. FISHER, A. M. SCALES, Assignee, &c., ET ALS., Appellees. } No. 456.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

A re-argument of this cause is deemed desirable, it is therefore ordered, that the same be restored to the argument docket, and that counsel be advised that the court will hear them further on the questions involved herein, during the coming May term of this court.

Feb. 10, 1903.

NATHAN GOFF,
Circuit Judge, Presiding.
EDMUND WADDILL, JR.,
Dist. Judge.

May 13, 1903 (May term 1903), the cause came on again to be heard and is reargued before Judges Goff, Purnell and Waddill by counsel, and submitted.

Order Requesting Counsel to Attend a Session of the Court for the Purpose of Formulating Questions to Be Certified.

Filed Nov. 21, 1903.

United States Circuit Court of Appeals, Fourth Circuit.

THE GUARDIAN TRUST & DEPOSIT CO. and THE GUARANTY Trust & Deposit Co., Appellants,
vs.
B. J. FISHER, A. M. SCALES, Assignee, &c., Appellees. } No. 456.

This case, heretofore argued and submitted, having been duly considered by the court, it is ordered,—the case being of the character and importance justifying it—that certain questions decisive of the same be certified to the Supreme Court of the United States, the answer to the same by that court being desired by this court for its assistance in the final disposition of the questions raised by the assignments of error herein.

It is further ordered that counsel in this cause be requested to attend a session of the court, to be holder on the 10th day of December 1903, for the purpose of formulating the questions to be so certified in order to obtain the said advice and direction of the Supreme Court of the United States.

Nov. 21st, 1903.

NATHAN GOFF,
Senior Circuit Judge, Presiding.

Dec. 10, 1903 (November term 1903) cause is argued by counsel in accordance with the order of this court entered on the 21st day of November 1903.

Same day, counsel given ten days to present statements as to what questions and parts of the record are to — certified to the Supreme Court *Court.*

And on another day, to-wit, July 20, 1904, the court filed a certificate of questions or *por*positions of law to the Supreme Court of the United States, which are as follows: to-wit:

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM,

No. .

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, APPELLANTS,

versus

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 456.

GUARDIAN TRUST AND DEPOSIT CO. AND GUARANTEE TRUST AND SAFE DEPOSIT CO. OF PHILADELPHIA, APPELLANTS,

versus

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE AND OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

CERTIFICATE OF QUESTIONS BY THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, TO THE SUPREME COURT OF THE UNITED STATES.

Filed July 20, 1904.

This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions arising from the record, and the doubt which the court has as to the correct decision thereof, that three questions raised on said appeal be certified to the Supreme Court of the United States for its consideration thereof; and that accompanying said questions, there shall be certified a statement from which such questions can be understood; which statement and questions are as follows:—

Questions.

First. Whether the fact, that under the decision of the Supreme Court of North Carolina, an action can be and is maintained, by a citizen and tax-payer of the State, against a water company organized under the laws of the State, contracting with (2) the city, (of which city said citizen is a tax payer and inhabitant) to furnish the city and its inhabitants with water for domestic and public purposes, and also for the purpose of extinguishing fire, for damages occasioned by the burning of the building within the city belonging to such citizen and tax payer, because of the alleged negligent failure to supply and furnish sufficient water and pressure from its engines and pumps to extinguish fires, the Circuit Court of the United States, sitting in equity in such case, in a suit for foreclosure of a mortgage given by the water company, should recognize the existence of such cause of action, and whether or not it is concluded by the rendition of a final judgment in the State Court in favor of the persons whose property has been destroyed by fire.

Second. Whether, because in said suit it was determined by the Supreme Court of the State that the judgment in such action was based upon a cause of action declared upon in tort, and not in contract, said Circuit Court of the United States is bound, and cannot for itself determine the question of whether the cause of action, if existing at all, was one arising in tort, or contract?

Third. Whether, assuming the existence of such cause of action, and that the same may be maintained in tort, a final judgment in such case against the water company obtained in the courts of North Carolina, is protected by section 1255 of the Code of that State, and should have priority in the distribution of the assets of the water company over its mortgage bonds theretofore issued.

Statement from Records.

(3) The foregoing questions arise under a bill for foreclosure of the mortgages, and the appointment of a receiver, filed in the United States Circuit Court for the Western District of North Carolina, by the Guardian Trust and Deposit Company, a corporation of the State of Maryland, against the Greensboro Water Supply Co., a corporation of the State of North Carolina.

Bill of Complaint.

(4) "First. That the complainant, your orator, is a body corporate, duly incorporated under an Act of Assembly of the

State of Maryland, and the laws of said State, originally under the name of the Guardian Security, Trust and Deposit Company, and performed and accepted all corporate acts under that name prior to the year 1898, but heretofore and since January 1st, 1898, its corporate name was changed by Act of Assembly of said State of Maryland, to the Guardian Trust and Deposit Company, and said complainant, your orator, is a citizen and resident of the State of Maryland, and the defendant herein named, the Greensboro Water Supply Company, is a body corporate, duly incorporated under the laws of the State of North Carolina, and is a citizen and resident of said last named State, having its principal office within said State and Judicial District, and that the subject matter, property and claim or thing in dispute in this suit is of value exceeding two thousand dollars, and within the jurisdiction of this Honorable Court.

Second. That heretofore, to-wit: July 1st, 1896, the said defendant, the Greensboro Water Supply Company, executed unto your orator, as trustee as therein set out, a mortgage or deed of trust of said date, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford county, North Carolina, in Book No. 102, page 764, etc., which mortgage is herewith filed and designated "Complainant's Exhibit No. 1," and is prayed to be taken as part of this bill; and that your orator, the complainant, as appears by said mortgage, in the course of the performance of the business and duties for which it was incorporated, accepted said trust by said deed conferred, and bound itself to carry out the trusts and duties thereby imposed.

Third. That said mortgage or deed of trust was executed to secure an issue of one hundred and ten bonds of the denomination of one thousand dollars each, Nos. 1 to 80, inclusive, being denominated Series A. bonds, and having a prior lien upon both the property, revenues and earnings of said defendant company, and Nos. 81 to 110, inclusive, being denominated Series B bonds, and having a lien upon said property and revenues next after series A bonds; that of said Series A bonds, fifty, being the Nos. 1 to 50, inclusive, were given by the terms of said deed to your orator to be held by it in trust to secure the payment, redemption or retirement, prior to maturity, of fifty bonds of the denomination of one thousand dollars each, issued under a mortgage or deed of trust of the Greensboro Water Company, a body corporate, dated, to-wit: January 10th, 1888, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford county, North Carolina, which mortgage or deed of trust, and the bonds secured thereby, are in full operation and

effect and outstanding, and, except subject to the operation of (5) which mortgage, the defendant, the Greensboro Water Company, never received any title to the property in these proceedings mentioned, and subject to the operation of which mortgage it made its conveyance to your orator as herein set out. And the said fifty bonds, Nos. 1 to 50, inclusive of Series A are now in the possession of your orator, and are held by it according to the terms of said deed of trust or mortgage, but have not otherwise been issued, nor have they been sold or negotiated to any person whatsoever.

Fourth. That, therefore, the bonds which have been sold and negotiated and are issued and outstanding under the said mortgage consist of thirty bonds of Series A, Nos. 51 to 80, inclusive, each of the denomination of $1,000.00, and thirty bonds of Series B, each of the denomination of $1,000, and numbered 81 to 110, inclusive; and your orator has been requested by the holders and owners of the majority of each of said classes of bonds secured by said mortgage, to file this bill of complaint and invoke the action of this court herein prayed, in the premises.

Fifth. And your orator particularly avers and charges that defaults have occurred and taken place in the terms of said mortgage or deed of trust, which it was the object and intent of said mortgage to provide against and secure, and upon the happening of which, it is provided by said mortgage, that it should be the right and duty of your orator to re-enter upon and possess said property, or to sell the same with or without re-entry upon and possession of the same, and always to have a receiver appointed to take the same into his care, custody and management under the direction of a court having jurisdiction of the premises, until the said property mentioned in said mortgage should be sold in accordance with the terms of said mortgage or otherwise, under the direction of said court, as might be deemed advisable by said court for the protection of the interests of said bondholders and all others interested in said property, and that the defaults or breaches of the terms of said mortgage which have occurred, are all those mentioned in and provided against in clause five (5) of said mortgage, viz.:

(a) The semi-annual interest upon the outstanding bonds of Series A and Series B, falling due Aug. 1st, 1900, was not paid out of the moneys, funds and revenues of the said mortgagor, the defendant corporation, but from money borrowed to pay the same, which money is still due and unpaid, and assets (6) of the corporation upon which your orator has a lien as

security for said bondholders were pledged to raise the money paid out on said coupons, which was a virtual breach and default under said mortgage, and has continued more than one month.

(b) The semi-annual interest falling due August 1st, 1900, upon the fifty thousand dollars of bonds known as the first mortgage bonds of the Greensboro Water Company, being a lien as aforesaid by the terms of the deed of trust made by said Greensboro Water Company prior to the acquisition of this property by the defendant, were not paid August 1st, 1900, out of moneys in the treasury of the defendant company, but out of the moneys borrowed by said defendant company as next above set out, thereby subjecting the property of the defendant company to a default under the terms of said prior mortgage, and thus depriving the holders of the bonds issued under the terms of the mortgage to your complainant of the security guaranteed to them under said mortgage.

(c) Lawful charges and taxes due and payable by said defendant company are now in arrears to a considerable amount, to-wit: to the amount of $1,000.00.

(d) A judgment lien of the amount of $5,000 upon a judgment obtained at the suit of one Gorrell in the Superior Court of Guilford county, was obtained, and execution issued therefor, and levied upon all the property and franchises of the defendant company, which execution was stayed and superseded upon the giving of a bond with security in the penalty of $6,000, but the surety, upon said supersedeas bond, the Fidelity and Deposit Company of Maryland, *is* now by law, and as a condition of joining in such bond, became substituted and subrogated to all the rights of said judgment creditor and in a position to enforce said judgment lien at any time, and as a consequence of such judgment and execution the Judge of the Superior Court of Guilford county appointed a receiver for all the property of the defendant company, which receiver was only discharged upon giving the bond as aforesaid, and may be reappointed by said court at any time upon the instance of the Fidelity and Deposit Company of Maryland, standing in the place of said judgment creditor, Gorrell.

(e) Besides the said claim of the said Gorrell reduced to judgment as aforesaid, said defendant company is harrassed and threatened with many other claims, amounting in the aggregate to $30,000, for alleged damages occurring by fires, (7) which said claimants allege it was the duty of said de-

fendant company to prevent or extinguish under the terms of some alleged contract made with the city of Greensboro for their benefit, which claims, if reduced to judgment, said claimants allege to be prior to the lien of the bonds secured by the deed of trust or mortgage made to your orator, but wrongfully, as your orator is advised and charges, but, nevertheless, your orator is entitled, and so claims and charges, to have this court take jurisdiction of the property and assets of this company and determine the rightful lien and priorities, if any, of one creditor over another, and particularly to enforce the lien of the mortgage or deed of trust made to your orator for the benefit of the holders of the bonds secured thereby.

(f) And, particularly, that said defendant company is indebted to several and various persons and corporations in several sums of money for work done and materials and supplies furnished upon its order and for its benefit, over and above the mortgage indebtedness above referred to, the aggregate of the principal of which mortgage indebtedness is one hundred and ten thousand dollars, and there is no money in the treasury of the company to pay such floating indebtedness, nor the interest upon said mortgage bonds; and said defendant company is, in law and fact, insolvent, so that its assets should be taken into the care and custody of this court and operated by this court for the benefit of its several classes of cerditors, and ultimately administered and distributed according to the lawful priorities of said creditors.

Sixth. And your orator particularly avers and charges that by the fifth clause of the mortgage or deed of trust, Exhibit No. 1, it is made the express duty of your orator, whenever it shall appear to such trustee or to the holders of the bonds secured thereby, proper and desirable for the protection of the interests and estate conveyed in trust, or for the more perfect effectuation of the trusts and purposes declared in said deed, to apply to a court of equity of any of the States, or of the United States, having general jurisdiction over the subject matter, to assume jurisdiction of the trust, and to order, decree and carry out the remedies in said mortgage proposed and accorded, as well as such other remedies as the court may deem needful and proper for the protection and benefit of the holders of the bonds secured in said mortgage, and that the assent of said defendant company is therein pledged and given finally in advance to the immediate appointment of a receiver by the court upon such application, and that, in view of the facts herein before stated, and (8) other facts known to your orator, and said bondholders, showing the danger of waste, injury and dissipation of the property

composing said truste estate, your orator and said hondholders deem the immediate appointment of a receiver to hold and operate said property under the direction of the court in the premises necessary for the preservation and protection of said property, and to the full and proper exercise and execution of the rights and remedies accorded by said deed of trust. And, further, that upon consultation with the members of the board of directors of said defendant company, they have, just prior to the filing of this bill, acknowledged the existence of the causes for the immediate appointment of a receiver, and assented to such action and its necessity.

Seventh. Wherefore, in consideration of the premises, your orator prays your honors to pass an order, or orders, and decree of the court to the following purpose and effect.

(1) Appointing immediately a receiver of this court to take into his custody, possession and management, all the property, assets and rights of the defendant, the Greensboro Water Supply Company, and to carry on the operation and business of said company under its franchises, and under the direction of this court, and to collect all the rents, profits and revenues of said company, and all moneys now due and to become due said company, and to sue in his name, as said receiver, in this court, or any court of the United States, or of any of the States having jurisdiction in the premises, for the possession or recovery of all property, money, assets, or any other thing belonging to said company, or to which said receiver may be entitled thereunder.

(2) Enjoining and prohibiting any and all persons and corporations whatever from interfering with said receiver so as aforesaid appointed by this court, either as to his possession of the property of such compauy, or the management thereof, and especially from suing said company, or, by any proceeding under the form of law, attempting to deprive said receiver of the possession or right to the possession of all the assets, rights, credits and moneys of said defendant company, except upon application to this court in this proceeding, which possession and rights and disputes relative thereto, this court is competent to determine, and will of right determine.

(3) Referring the papers and proceedings in this cause to a special master or auditor to be appointed by this court to take
(9) an account, and to make a report to this court of all the property, assets, rights, and franchises of the defendant company, and the value thereof, and all the indebtedness of said defendant company, and the lawful lien and priority of the

various classes of creditors, and whatever else such special master may be requested to report by the parties to this cause.

(4) Passing a final decree or order in the premises, selling, or otherwise disposing of the property and assets of said defendant company, so as to execute fully and fairly for the benefit of the holders of the bonds secured by the mortgage in these proceedings, the trusts declared therein for their benefit, either according to the terms of said mortgage or according to the course and custom of this court, as may appear proper to this court.

(5) Granting such other and further relief as may to this court seem fit and may to your orator's case seem necessary, in view of the facts and circumstances herein alleged and which may be made to appear at the final hearing of this cause.

And, further, to grant the writ of subpœna directed to the said defendant, the Greensboro Water Supply Company, to be served upon its president or other officer commanding said defendant on or before a day therein named, to appear and answer (an answer under oath being expressly waived) the matters and facts herein alleged against it, and show cause, if any there be, why a decree should not be passed as prayed.

And will ever pray."

STATEMENT "A."

(10) To this bill, an answer was filed by the Greensboro Water Supply Company, admitting the matters and facts alleged in said bill, and consenting to the appointment of receivers therein prayed for; and an order was subsequently duly entered authorizing the sale of the mortgaged property, at the price of $75,000.00; and upon confirmation of the same, by an order filed July 27th, 1901, it provided for the assertain of claims upon said property against the fund under the control of the court.

EXTRACT FROM DECREE FILED JULY 27TH, 1901, LAST REFERRED TO.

(11) "And the said receiver is hereby directed and ordered to retain the said purchase money so as aforesaid ordered to be paid to him, in his hands, subject to the further order and direction of this court, and pending the determination by this court of the claims of all parties whatsoever having any claim in or a right to or a lien or incumbrance upon the property so as aforesaid sold and ordered to be conveyed, or to the proceeds of

sale thereof. And meanwhile said receiver shall deposit said money at interest upon the best terms obtainable by him in such lawful depositories as may be designated and approved by the court.

And, further, all the said parties to this cause and all persons who have intervened or appeared herein on account of any interest claimed in the premises, and all persons whatsoever claiming any right, title or interest in, or lien upon the property hereby sold and ordered to be conveyed are forever prohibited and enjoined from interfering with the possession, title, enjoyment, management and control of the said property by the said purchaser, the City of Greensboro, to whom the same is ordered to be conveyed, by any act or proceedings whatsoever, in any court of any jurisdiction, or in any manner whatsoever, but all such persons and all persons having or claiming any right, title or interest in, or demand or lien upon the said property hereby sold and ordered to be conveyed, or the proceeds of sale thereof, are hereby ordered and required to file such claim or demand, if not already filed or claimed in these proceedings, by petition in these proceedings for the consideration and action of the court thereon, within sixty days of the date hereof, or to be forever barred of all such right, claim or demand, and the receiver of this court is hereby ordered to give notice to this effect, by publication once a week for four weeks in the Greensboro Daily Record, of the terms of this order, and that copies of this order be served personally on Helen G. Brown, A. M. Scales, assignee, A. A. Hinkle, B. J. Fisher and the Southern Stock Mutual Insurance Company of Greensboro, N. C."

(12) STATEMENT "B."

The questions in this case relate to the proper ditribution of the fund under the control of the Court, and the priority of claims thereon. The trustees of the two mortgages claim that the fund must be applied towards the satisfaction of their mortgages, according to their priorities, and that only the balance remaining can be applied to the payment of the judgments; whereas, the intervenors, who are judgment creditors of the Greensboro Water Supply Company, insist that under the statute law of North Carolina, in force when the mortgages were executed, and which must be read as though incorporated in the mortgages, priority is given to judgments of the class to which their judgments belong, over any mortgages executed by the defendant corporation; the statute under which they claim being in force at the time of and prior to the execution of either of said mortgages. The intervenors, pursuant to leave and re-

quirement as aforesaid, duly appeared in the cause, presenting the question of the priority of said judgments; as did also the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee under the first mortgage given by the Greensboro Water Company, theretofore regularly made party to the cause, file its answer controverting the position taken by the judgment lienors aforesaid; which was likewise done by the complainant trustee under the second mortgage given by the Greensboro Water Supply Company. The petition of intervention of B. J. Fisher, and the judgments and pleadings under which the same was procured, to be hereinafter set out in full, fairly presents the issues raised by the several judgment lienors; and the answer of the Guarantee Trust and Safe Deposit Company sets forth the question raised by the bondholders.

(13) APPEARANCE OF B. J. FISHER.

"For answer to the rule to show cause issued by this Honorable Court on the 29th day of July, 1901, 'Why the City of Greensboro shall not comply with its proposition to purchase what is known as the Greensboro Water Works, etc., and especially why the said city shall not take a deed for said property, and pay over the purchase price proposed and accepted by this court,' heretofore served upon him, B. J. Fisher, a judgment creditor of the above named defendant company, reserving to himself, every and singular, all rights or lien, or other rights, or interests, which have heretofore, or do now exist, or attach to his said judgment, or are incident thereto, by virtue of the laws of the State of North Carolina, or otherwise, respectfully showeth unto your Honors:

1. That, in the month of June, 1899, the defendant corporation, then engaged in the business—for compensation—of furnishing to the City of Greensboro, and the inhabitants thereof, the necessary supply of water for domestic and fire purposes, negligently failed to perform the duty and obligation imposed upon it, whereby the property of the said B. J. Fisher, an inhabitant and tax payer of the City of Greensboro, was destroyed by fire for lack of water, and water pressure, to extinguish the same, and he, the said B. J. Fisher, was greatly damaged by the tortious negligence and carelessness of the said company.

2. Subsequently thereafter, to-wit: on the 20th day of (14) July, 1899, the said B. J. Fisher began a civil action in the Superior Court of the county of Guilford, State of North Carolina, against the defendant corporation for the re-

covery of damages for the tortuous injury sustained by him, by reason of the negligence of the defendant corporation; and sued out a summons in the Superior Court, returnable at the —— term, 1899. The defendant corporation duly entered an appearance and filed answer to the complaint of the plaintiff, and the trial of the cause, in the due course of the court, was continued from term to term, until the special term of said court held in January, 1901, when the case was regularly tried before a jury upon issues submitted, which issues were found by the jury in favor of the plaintiff, B. J. Fisher, and against the defendant corporation, and assessed his damages in the sum of $25,000, upon which verdict the court rendered a judgment (reciting the issues so found by the jury) in favor of the plaintiff and against the defendant corporation in the sum of $25,000. The plaintiff appealed to the Supreme Court of the State from the judgment thus rendered, upon the ground that he was entitled to a judgment for tort against the defendant corporation, which contention was sustained by the Supreme Court of the State, and, at the February term, 1901, of said Supreme Court, a judgment final for tort was rendered by said court in favor of the plaintiff, Fisher, a copy of which judgment has heretofore been filed with the special master in this case, and likewise attached hereto and prayed to be taken as part of this answer.

3. That subsequent to the institution of the said suit by the plaintiff, Fisher, against the defendant corporation, and before the trial of the cause, as aforesaid, to-wit: on the 19th day of September, 1900, the defendant corporation was placed in the hands of R. R. King, Esq., as receiver, who, prior to his appointment as receiver, was counsel for the defendant corporation in said suit with Fisher, and tried the case at the special term, January, 1901, as such counsel, and likewise participated in the argument on appeal in the Supreme Court of the State at Raleigh.

4. That the judgment of the said Fisher was obtained and acquired before a court of competent jurisdiction, both as to the parties and the subject matter in controversy, and, as he is informed and believes, in law, is conclusive.

5. That under Section 1255 of the Code of North Carolina (it being an act of the General Assembly of the State passed at its session in 1879) mortgages made by an incorporated com-
(15) pany upon its property or earnings, whether in bonds or otherwise, thereafter issued, shall not have power to exempt the property or earnings thus mortgaged from execution or satisfaction of any judgment obtained in the courts of this State

against said corporation for torts committed by it, its agents or employees, for injury to property. That the judgment of the said B. J. Fisher is for a tort for injury to his real property.

6. That the mortgages under which the bondholders claim, and for the foreclosure of which the bill of complaint in this action is filed, were made and executed by the Greensboro Water Company and the Greensboro Water Supply Company, both State corporations, and were so made and executed subject to the legislative enactment above referred to, and by operation of law are void as to the judgment of the said Fisher.

7. That on the —— day of February, 1901, the said judgment of the said Fisher was duly docketed in the Superior Court of Guilford county aforesaid, and from that date became a lien on the water works property, which lien, it is respectfully submitted by the said Fisher, has a priority over the bonds issued in pursuance of the mortgages above referred to, and any other mortgage or mortgages which may have been made upon said water works subsequent to the passage of the act of 1879.

The said Fisher, not being a party to the contract between the receiver and the municipal authorities of the City of Greensboro, is advised by counsel that it is not incumbent upon him to participate in said transactions, otherwise than to inform this Honorable Court of the nature and character of his said judgment, and his rights thereunder and incident thereto.

This the 27th day of September, 1901.

Respectfully submitted."

COMPLAINT OF B. S. FISHER.

(16) "B. S. Fisher
against
Greensboro Water Supply Company.

The plaintiff complains of the defendant, and alleges:

I. That the defendant company is a corporation duly organized under the laws of the State of North Carolina, and as such is engaged in supplying water to the City of Greensboro and its inhabitants for the purposes of domestic use, and also for use in case of fire, and as such are the owners and possessed of all the rights, privileges, powers and franchises necessary and incident to the operation and conduct of the business in which it is engaged.

II. That by virtue of a deed executed to the defendant company by Hugh L. Pope, on the 31st day of May, 1896, as will appear by reference to Book 104, page 656, etc., in the office of the Register of Deeds of the county of Guilford (to which reference is made, and so much thereof as is applicable to this case is hereby prayed to be taken as a part of this complaint), the said defendant company became the purchasers, and possessed of all the rights, titles and interests (in law or in equity), powers, franchises, earnings and revenues theretofore owned or acquired by the Greensboro Water Company, or exercised and acquired by James D. Glenn, receiver, in a certain suit in the United States Circuit Court, at Greensboro, wherein one Middendorf and others were the plaintiffs and the Greensboro Water Company was the defendant, including all the property, real, personal and mixed, and all the rights and interest in law and equity, privileges, powers, franchises, earnings and revenues belonging to, or acquired by the said Greensboro Water Company, or exercised and acquired by the said James D. Glenn, receiver, as aforesaid, under and by virtue of the laws and acts of the Assembly of the State of North Carolina, and under and by virtue of the acts, concessions and permissions of the corporation of the City of Greensboro, or its Board of Aldermen or other officers or representatives, either of the city (17) or of the county of Guilford, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, or the decrees of the said court, together with all the real estate, personalty, rights-of-way, or other easements or property or any sort or description whatsoever, in the State of North Carolina, or wheresoever situated, of the said Greensboro Water Company, or the said receiver, including particularly all the water works, dams, reservoirs, tanks, pumps, basins, pipes, mains, hydrants, fire plugs, owned or acquired by the said Greensboro Water Company or the said receiver, and all the machinery, engines, tools, implements and materials for constructing, operating or repairing said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money and income arising, or to arise, from the operation of the said water works under the franchises granted or belonging to the said Greensboro Water Company.

III. That under the contract entered into between the City of Greensboro, a municipal corporation, acting in accordance with law, and by virtue of its charter, a contract or ordinance was made in pursuance thereof, and in accordance with law, whereby W. W. Taylor and others were authorized to construct and maintain and operate water works and supply the City of Greensboro and its inhabitants with water, etc. That under

said contract the said Taylor and others were empowered to build, construct, maintain, own and operate water works in the City of Greensboro, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use; to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of the city, then existing or thereafter to be laid out or opened up, for the purpose of conducting and distributing water throughout said city; to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump-houses and other appliances and attachments necessary for the proper constructing and carrying on of said water works, etc., so as to secure the most adequate supply of water for all domestic use, and the greatest protection against fire, for the term of twenty (20) years from the date thereof, to-wit: the —— day of ———, 1887.

(2) It was further contracted and agreed that the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works should be ample and sufficient for the purposes mentioned in the said contract. (18) That it was further agreed that said water works, to-wit: its pump-house or other suitable house in connection therewith, should at all times be occupied by an engineer, or some suitable and intelligent employee, who should at all hours be accessible to the call of the city for water; and in order to facilitate a sufficient supply of water in case of urgency or peril, it was further agreed that the said pump-house, or other suitable house, should be connected with the fire department of the city, or other place designated by the city, by a telephone, electrical apparatus, or any like suitable appliance, by which alarms, calls, and communications might be had at all hours with the engineer or employe at said pumping-house or dwelling, as aforesaid, so as to make communication of threatened danger or want of water at all times as speedy and as sure as possible. And that the said Taylor and others should keep a suitable, intelligent and efficient employe always at a place where he could be accessible to the alarms, calls and communications above named, and whose duty it was to respond promptly to such alarms, calls and communications.

(3) That the engines and machinery should be adequate and adapted to the requirements of said contract, and the machinery and appurtenances should be sufficient to give a capacity of one and one-half millions (1,500,000) gallons of water in twenty-four (24) hours against a pressure of two hundred (200) feet head.

(4) That the storage water tank, from which the supply of water comes immediately should be, at its top water level, one hundred (100) feet above the surface of the ground at the center of the public square near the court-house, and should be of a capacity to hold at least one hundred thousand (100,000) gallons of water, and should be filled to its top every day, an hour before sundown.

(5) That for the extinguishment of fires pumping engines should be kept ready at all times to supply the needed fire pressure.

(6) That the City of Greensboro should pay for the seventy-five (75) hydrants named in the said contract the sum of two thousand, eight hundred and seventy-five dollars ($2,875), payable semi-annually on the 1st day of July and on the 1st day of January of each year, th[illegible]t payment of the fraction to be payable the 1st day of July, 1888.

IV. That the said W. W. Taylor and others, on the 29th (19) day of December, 1887, were incorporated under the general laws of North Carolina by the name and style of the Greensboro Water Company, whereby they were empowered to build and construct water works and to own and operate the same for the purpose of supplying the city of Greensboro and the inhabitants thereof with pure and wholesome water for domestic and sanitary purposes, for manufacturing and for protection against fire; which articles of incorporation are recorded in the office of the Clerk of the Superior Court of the county of Guilford in "Record of Incorporations," pages 38 and 39, to which reference is hereby made; which said articles of incorporation, filed as aforesaid, together with all the privileges and powers therein granted, was ratified by the General Assembly of North Carolina on the 3d day of March, 1891, as will appear by reference to chapter 166 Private Laws of North Carolina, pages 1009 and 1010, which said act likewise conferred upon the company power to borrow money and to secure same by mortgage.

V. That the contract, as aforesaid, made with the said W. W. Taylor and others, was assigned and transferred to and assumed by the said Greensboro Water Company, which said company acquired all the rights, privileges and powers therein granted and conferred to the said Taylor and others, and undertook to carry out the provisions thereof by constructing water works, pump-houses, engines, or tanks, towers, mains, pipes, hydrants, etc., for the purpose of supplying the inhabitants of

the City of Greensboro with water under the said contract, and likewise for the purpose of supplying a sufficient quantity of water for the extinguishment of fire. That under the said contract the said water works company collected under said contract from the City of Greensboro an annual rental of two thousand, eight hundred and seventy-five dollars ($2,875), up to and until the 4th day of June, 1892, when the said company went into the hands of a receiver, by virtue of a decree of the Circuit Court of the United States in the said case of Middendorf and others against the Greensboro Water Company, which said two thousand, eight hundred and seventy-five dollars ($2,875) was, by an agreement made with the said water company, paid to Baltimore Trust and Guarantee Company, of the City of Baltimore, to be applied to the payment of interest on mortgage bonds issued by the said Greensboro Water Company. Said amount was paid by the said City of Greensboro, on account of the said water company, up to the time of the appointment of said Glenn as receiver, and thereafter annually paid to him during the ope-
(20) ration of the works by him as said receiver, the same being raised by taxation for the necessary and incidental expenses of the city, laid upon the inhabitants thereof, and collected as other taxes are collected, for the use of the government of said city.

VI. That the plaintiff in this action is an inhabitant and a taxpayer, both upon real and personal property, in the City of Greensboro, and was assessed his proportionate part of taxes according to the property owned by him, and he paid the same to the City of Greensboro as a part of the said two thousand, eight hundred and seventy-five dollars ($2,875), as a rental for the water to be furnished by the said water company to the said City of Greensboro and its inhabitants under the said contract.

VII. That, by virtue of his said appointment as receiver, the said James D. Glenn undertook to carry out the contracts and agreements of the said Greensboro Water Company, among which was the above mentioned contract of Taylor and others with the said city, which had been assumed by the Greensboro Water Company, and, during the time he was receiver, additional mains and pipes were laid, and hydrants constructed, and other improvements put upon the works, for which an additional amount was paid by the City of Greensboro to the said receiver under the terms of the said contract.

VIII. That, by virtue of a decree of the Circuit Court of the United States in the said suit of Middendorf et al., the property of the Greensboro Water Company was sold as aforesaid

by Commissioners Archibald H. Taylor and Robert R. King, on the 30th day of April, 1896, at which sale the said Hugh L. Pope became the purchaser, to whom was conveyed all the rights, titles, privileges, franchises, property, real, mixed and personal, including all the contracts assumed by the said Greensboro Water Company, and the said Glenn, receiver, including all tanks, dams, reservoirs, pumps, basins, pipes, mains, hydrants and fire plugs owned or acquired by the said Greensboro Water Company or the said receiver, and all the machinery, engines, tools, implements and materials for constructing, operating and repairing said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money and income arising, or to arise, in the operation of the said water works under the franchise granted or belonging to the said Greensboro Water Company, which said deed of conveyance is referred to and made a part of the deed made by the said Pope to the defendant (21) in this action, the Greensboro Water Supply Company, to which reference is hereby made, the same being recorded on page 652, Book 104, Register's office of the county of Guilford.

IX. That the said defendant company, by virtue of the said deed of conveyance, as aforesaid, took possession of the said property of the Greensboro Water Company, then in the hands of the said receiver, and all other property and effects belonging to it, and has been, from the time of said purchase and up to and including the time hereinafter mentioned, so conducting, managing and operating said water works, and have been laying pipes and water mains for the purpose of conveying water through the streets, avenues, and alleys of the city, and have been distributing water throughout said city, and have been receiving rentals and incomes from the said City of Greensboro, and the inhabitants thereof, for the use of the water supplied by it, and have assumed all the obligations and duties imposed upon it, and have enjoyed all the privileges and benefits derived from the said contract, hereinbefore referred to, a copy of which contract, made with the said Taylor and others, as aforesaid, which contract is hereto attached, marked Exhibit "A," and so far as is applicable is hereby made a part of this complaint.

X. That when the said defendant company took possession of the said water works, it took it with the agreement and understanding between it and the said City of Greensboro, that it would keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred (100) feet of hose and a one-inch ring and nozzle, and that they would constantly,

day and night, keep all the said hydrants in good order and supplied with water for fire purposes.

XI. That on the morning of the 17th day of June, 1899, about the hour of noon, the Benbow house, a four-story hotel, situate on the corner of South Elm and Sycamore streets, in the City of Greensboro, accidentally and without any fault on the part of the plaintiff, the owner and proprietor of said hotel, caught on fire at the southwest corner of the building on Sycamore street, just over the building known as the kitchen, near or in the mansard roof of the building. That immediately after the fire was discovered an alarm was sounded, and in the space of a short time, or as soon thereafter as it was practicable, the fire department of the City of Greensboro responded to said alarm, (22) and immediately came to the said Benbow hotel, having with them their hose, their engine, aeriel ladders and all other necessary appurtenances for the immediate and ready extinguishment of the fire. That upon arriving at the scene of the fire, within ten (10) minutes after the alarm had been sounded, the hose had been attached to the hydrants of the defendant company in and about and near the said hotel, and the water turned on. The seat of the fire being the immediate objective point of the fire company, a stream of water was undertaken to be thrown from an aeriel ladder, which had been raised immediately under the fire on Sycamore street, when the water pressure was not sufficient to throw a stream higher than between the second and third-story windows, a distance not exceeding thirty (30) feet, falling short of the fire some twenty (20) feet or more. That almost immediately thereafter the aeriel ladder was raised to the top of the roof above the kitchen and on the building, and the water pressure was not sufficient to throw a stream of water with any force whatever from the nozzle, but the water simply oozed from the nozzle, without any force whatever.

XII. That immediately after the fire began, when it was almost in an insignificant state, the employees of the hotel undertook to use the hotel hose, which was connected with the water main within the building, but owing to the lack of pressure of water, the said hotel employes and others attempting to extinguish the fire could not reach the fire with the water, notwithstanding the nozzle of the hose was within eight (8) or ten (10) feet from the seat of the fire.

XIII. That at any time within thirty (30) minutes after the fire had been discovered, if there had been sufficient pressure of water to play upon the building and fire, either by the com-

pany hose, which was attached to the hydrant on the outside of the hotel, or from the hotel hose in the hotel, the fire could have been speedily and easily extinguished with but very little damage to the property and building. That not for more than one hour after the fire had begun, and not before it had gained such headway as to consume a greater portion of the building, and do great damage, was the pressure of water sufficiently strong to throw a stream as high as thirty (30) feet, falling short of the seat of the fire in almost every attempt to reach it; and even after the hose was carried to the roof of the house by the firemen and an attempt was made to use the water from the top of the building, the pressure was not sufficient to give any effective force to the water, whereby the fire could be even re-
(23) tarded, much less subsided. That a number of hose were attempted to be used on the east side of the hotel on South Elm street, as well as on Sycamore street, but not until after the fire had gained such headway as to have produced great damage and destruction of the property was there a sufficient pressure of water supplied by the defendant company to reach the fire, or to be of any practical benefit in its extinguishment.

XIV. That the fire department of the City of Greensboro was in every respect fully equipped, capable and efficient to cope with said fire, and if supplied with a sufficient pressure of water, whereby a stream of water could have reached the fire, which was less than a vertical height of one hundred (100) feet in still air, it could, with little difficulty, have extinguished the same; in fact, had the water pressure been sufficient to have forced the water out of the hose attached inside of the hotel, known as the hotel hose, the fire could have been extinguished within from three (3) to ten (10) minutes after it had been discovered.

XV. The plaintiff alleges that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the City of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the City of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city, and derived by said city from taxation on the inhabitants thereof, and particularly on the plaintiff, a property owner, as aforesaid, and a tax payer in the said City of Greensboro, and by reason of the said wilful, tortious, culpable, reckless and gross negligence of the said defendant company, and by reason of its failure and omission to perform its contractual, as well as its public obligations and duties to the said City of Greensboro and its inhabi-

tants, and especially toward the plaintiff in this action, in that it wholly failed and carelessly and negligently refused to furnish the said hydrants in and about the said hotel, as hereinbefore set forth, with a sufficient pressure of water to extinguish the said fire before the same had greatly damaged and effectually destroyed and injured a greater part of the said building, and by reason of such tortious, negligent and careless conduct on the part of the said defendant company the plaintiff was damaged in the sum of forty thousand dollars ($40,000.00).

XVI. The plaintiff is advised, and so alleges, that the de-
(24) fendant company negligently failed to perform its obligations to the said City of Greensboro and its inhabitants and tax-payers, and especially toward the plaintiff in this action, by carelessly, wilfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said City of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied.

XVII. The plaintiff alleges that the defendant company negligently and carelessly failed to keep its pumping engine ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned.

XVIII. That there was sufficient hydrants in and near said hotel property to amply furnish a sufficient quantity of water to have extinguished the said fire if there had been a sufficient pressure upon the same, whereby the water could have been utilized by the fire department, but by reason of the lack of pressure the said fire department, as hereinbefore stated, was wholly unable to arrest the flames in their ravages of the building and property of the plaintiff, but stood helpless and impotent to extinguish the said fire and save the said property of the plaintiff from the great damage and destruction which thereby ensued.

XIX. That the omissions and failure of the said defendant company to perform its duty and obligations, as hereinbefore set out, and its gross negligence in failing to supply a sufficient water pressure to meet the exigencies and necessities of the occasion, which was its bounded duty to do, both under the contract as hereinbefore stated, as well as the benefits derived

and enjoyed by it by the license and privileges granted to it by the said City of Greensboro and its inhabitants, the property of the plaintiff was almost wholly destroyed, greatly to his damage, in the sum of forty thousand dollars ($40,000.00).

XX. That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the of the destruction of his property, whereby the defendant company becomes liable therefor.

Wherefore the plaintiff demands judgment against the defendant, The Greensboro Water Supply Company, for the sum of forty thousand dollars, damages and the costs of this action, and for such other and further relief as in law or equity he may be entitled."

JUDGMENT ON FISHER COMPLAINT.

(25) "This cause coming on to be heard and being heard before His Honor Judge Timberlake and a jury, at the January Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury, and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, set out and described in the complaint, in the quantity and for the purposes set out? Answer. 'Yes.'

2. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. 'Yes.'

3. Did the defendant company fail to comply with its contract? Answer. 'Yes.'

4. Was the plaintiff injured by the negligence of the defendant? Answer. 'Yes.'

5. What damage, if any, has the plaintiff sustained? Answer. '$25,000.00.'

It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff, B. J. Fisher, recover of the defendant, the Greensboro Water Supply Company, the sum of twenty-five thousand dollars ($25,000) damage, and for the costs of this action to be taxed by the clerk."

ORDINANCE OF THE CITY OF GREENSBORO.

(26) "An ordinance authorizing W. W. Taylor, of Philadelphia; Charles S. Hinchman, of Philadelphia, and Fred B. Hubbell, of Baltimore, to construct and maintain and operate water works to supply the City of Greensboro, North Carolina, and its inhabitants with water, and defining their rights, duties, privileges and powers.

Section 1. That the said Charles S. Hinchman, W. W. Taylor and Fred B. Hubbell be, and they are hereby, empowered to build, construct, maintain, own and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use, to lay down pipes and water mains for the purpose of conveying water through the streets, avenues, and alleys of said city, subject to the conditions hereinafter named, to use within the present and future limits of said city any and all streets, avenues, alleys and bridges, and such other public grounds as are now or may be hereafter laid out while constructing or repairing such water works, to receive, take, store and purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses and other appliances and attachments nec-
(27) essary or expedient for the proper conducting and carrying on said water works, to cross any street in said city, in laying or extending their pipes, conduits or aqueducts as may be necessary and proper for the distribution of water throughout said city, so as to afford the most adequate supply for all domestic uses and the greatest protection against fire.

Provided, however, that the said grantees aforesaid shall not permanently use any street, avenue, alley, bridge or public grounds above named or occupy the same for any longer time than necessary for the purpose hereinafter indicated, without the permission of the Board of Commissioners, first obtained.

Nor shall the aforesaid grantees permanently injure any street, avenue, alley, bridge or other public grounds above named, but shall restore them to the like condition as it found said streets, avenues, alleys, bridges and public grounds aforesaid, saving the necessary and proper underground work Pro-

vided also that the supply of water hereinbefore named shall continue sufficient for all domestic, sanitary and fire purpose and individual use.

Said grantees are to have the exclusive right to construct, maintain and operate said water works as hereinafter specified, and on the conditions, terms and liabilities set out in this ordinance for the term of twenty years from the date of the completion and acceptance of said water works, and unless such rights shall sooner be terminated as hereinafter provided by purchase or forfeiture, all such rights and liabilities shall continue for another like period of twenty years, unless said additional term of twenty years be also ended as above provided by purchase or forfeiture.

Sec. 2. The plant of the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works shall be amply sufficient to supply water for the purposes hereinafter mentioned to at least twenty thousand people and to be enlarged and extended to supply a greater actual population, if so required by the Board of Commissioners of the city for the necessities of its inhabitants.

Sec. 3. In case there shall be any disagreement or controversies between the City of Greensboro and the grantees aforesaid in rgard to the supply of water or the quality of and quantity thereof or the manner of supplying the same, either party shall have a right to demand in writing of the other, that such manner of dispute, disagreement or controversy be submitted to arbitration, one arbitrator to be chosen by each party, who (28) are to be non-residents of the City of Greensboro and impartial and disinterested persons, and if they disagree they shall have power to call in an umpire, and the award of the two arbitrators, or one arbitrator and the umpire, filed in writing with the parties and signed by them, shall be final and binding upon both parties, and either party shall have the right to have the same specifically performed in a court of equity or other appropriate judicial tribunal and a failure to perform such award in a reasonable time by the aforesaid grantees shall work a forfeiture of its rights under the ordinance.

Provided that if the dispute or controversy be in regard to the quality of the water, the arbitrators and umpire shall be chemists of good reputation.

Sec. 4. The machinery, pipes, hydrants, valves, pumping plant and all other like appurtenances and fixtures used in the water works and in supplying the water are to be first-class in their material and the manufacture thereof.

The grantees aforesaid guarantee and stipulate that the water supplied shall be pure and wholesome, and that the supply shall be, and continue adequate to the demand for the same by the city or its inhabitants.

Sec. 5. During the progress of the work the grantees aforesaid shall not unnecessarily obstruct any street, avenue, alley or public ground in laying its pipes or conduits. They will properly repair and make good any gas or sewer pipes, previously laid, which shall be disturbed, misplaced, or injured by it, and complete each part of work commenced as speedily as possible and restore all the ground disturbed, to as good condition as it was before the work began, and that in the erection, construction and repair of said work in any street, avenue, alley, bridge or other public grounds aforesaid, and removing pavements, curbstones or sidewalks or other public grounds, and making all necessary excavations for repairs. The grantee aforesaid shall suitably guard and protect the same by enclosures, lamps, watchmen or by the use of any other precaution necessary to prevent injury to persons and property by reason thereof, and said grantees aforesaid shall be liable for all damages for failure to so guard and protect persons and property from injury, when occasioned by its negligence and shall save the city harmless therefrom.

Sec. 6. The water works shall be complete in all its details. The pump house erected shall be of brick, covered with metal and of substantial and neat architecture and, as far as possible, protected from fire. There shall also be in connection (29) with said pump house, near by or as a part thereof, an engineer's dwelling house to be occupied by the engineer or some suitable, intelligent and efficient employee of the grantees who shall, at all hours, be accessible to the call from the city for water.

That these houses, or such one as may be suitable and necessary, may be connected at the expense of the city with the fire department of the city, or other places designated by the city, by telephone, electrical apparatus or any like suitable appliances, by which alarms, calls and communications may be had at all hours with the engineer or employees at said pump houses or dwelling houses aforesaid, and so as to make the communication of threatened danger or want of water or other demand as speedy and as sure as possible.

And the grantees are to keep a suitable, intelligent and efficient employee always at a post where he shall be accessible to the alarms, calls and communications, above named, and shall respond promptly to such alarms, calls and communications.

Sec. 7. The engines and machinery shall be in duplicate and in the beginning, fully adequate and adapted to the ultimate requirements and stipulations of this ordinance and contract.

The machinery and appurtenances shall be sufficient to give a capacity of one and a half millions of gallons (1,500,000) in twenty-four hours against a pressure of two hundred (200) feet head.

The storage water tank from which the supply of water comes immediately shall be at its top water level one hundred feet (100) above the surface of the ground at the center of the public square near the court house and shall be large enough to hold at least one hundred thousand (100,000) gallons of water, and it shall be filled by the grantees aforesaid to its top every day an hour before sun down.

Sec. 8. For the extinguishment of fires the pumping engine shall be kept ready at all times to supply the needed fire pressure.

Sec. 9. The grantees aforesaid shall submit their water works, when finished, to the following as a test of its capacity and efficiency: They agree that the works shall throw six (6) streams of water from six (6) hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred feet (100) of hose and a one-inch ring nozzle.

Sec. 10. All the water mains and pipes used by the grantees (30) aforesaid shall be of the best quality, coated inside and outside with Dr. Angus Smith's patent coal tar varnish, and shall be tested at their place of manufacture to withstand a hydrostatic pressure of three hundred pounds to the square inch.

The distribution of pipes and the location of hydrants shall be as indicated in a map to be furnished by the city subject to be changed at any time by the city at its own expense. The pipes shall be laid and properly embedded in the ground of sufficient depth to prevent freezing. Not in any case to be less than two (2) feet from the surface.

The grantees aforesaid agree to extend the pipes whenever required so to do by the Board of Commissioners on condition that there shall be placed on said extension of piping twelve hydrants to the mile, for the rental of which the city will pay thirty-five dollars ($35.00) each, and which price shall be the rental of all hydrants over seventy-five.

Sec. 11. The grantees aforesaid agree to furnish a better hydrant than the Matthews double opening fire hydrant and to use the Eddy valve.

If the hydrants put in by the grantees shall be unsatisfactory in its operations to the city of Greensboro, it may require the grantees aforesaid to submit the matter to arbitrators as hereinbefore provided, and the grantees agree, if the arbitrators so award, to change the hydrants to the one designated by the arbitrators.

All the hydrants shall be made to fit on any particular hose coupling which shall be indicated in writing, by the City of Greensboro. The indication in writing to be furnished in twenty days from the execution of this contract.

Sec. 12. The city agrees to use the hydrants for the extinguishment of fire only, subject to exceptions hereinafter named, to-wit:

(1) The grantees aforesaid agree to furnish water to the city from the hydrants for street sprinkling, flushing gutters and sewers, fire drill and all other public city uses and purposes (not specified in the schedule of prices and free supplies) at the rate of two-fifths of a cent per barrel or ten (10) cents per one thousand (1,000) gallons.

The grantees aforesaid agree that they will furnish the following supplies free of charge, to-wit:

(1) One telegraph faucet in each of the two public schools.

(2) One fountain in the central portion of the city for the personal use of passers-by, horses from the country and those in (31) draft here, but not to be used by horses led indiscriminately from stables in the city to be watered at this fountain. Nor is water to be carried from the fountain for the use of citizens or others, nor of stock except as above provided.

Sec. 13. The size of the piping shall be as follows, to-wit:

From the pumping station to the south end of South Elm st.,	10 inches.
From this ten-inch pipe on South Elm street to the storage tank,	12 inches.
Along West Market from Elm to Edgeworth street,	8 inches.
Edgeworth street to Cedar street,	6 inches.
Cedar street to College,	6 inches.
Elm street to Forbis street,	8 inches.
Forbis street to Gilmer street,	4 inches.
On Cedar street,	4 inches.

On Spring street,	4 inches.
On Edgeworth street,	6 inches.
On Eugene street,	4 inches.
On Ashe street,	4 inches.
On Green street,	4 inches.
On Davie street from Market to N. C. R. R.,	6 inches.
On Davie South of N. C. R. R.,	4 inches.
On Forbis street,	4 inches.
On Percy street,	4 inches.
On Gaston street,	4 inches.
On Sycamore street,	4 inches.
On East Washington street to Forbis street,	4 inches.
On West Washington street,	4 inches.
On New street,	4 inches.
On Asheboro street,	8 inches.
On Depot street,	6 inches.
On Church street,	6 inches.
On Lindsay street,	4 inches.

It is the further agreement and understanding of the parties to this contract that if at any time hereafter it shall appear to the city that the foregoing sizes of piping are inadequate to the supplies needed in those localities that the City of Greensboro shall have the right to indicate its opinion in writing to the grantees aforesaid and request an arbitration to settle the matter. It shall then be the duty of said city and grantees aforesaid to appoint arbitrators as hereinbefore provided, and if they award that the piping shall be increased, it shall be the duty of (32) the grantees aforesaid to change the piping according to the award, and to begin such work within twenty (20) days after the award in writing is furnished to said grantees.

Sec. 14. The grantees aforesaid shall furnish supplies of water to the Greensboro Female College and Bennett Seminary, if desired by them, at the same rates and prices and on the same conditions, terms and regulations as it furnishes supplies to the City of Greensboro and its inhabitants.

Sec. 15. If the hydrants get out of order it shall be the duty of the grantees aforesaid to use all the diligence to repair the same and shall forfeit two dollars ($2.00) per day to the City of Greensboro for every day that it fails to perform said duty.

Sec. 16. The grantees aforesaid shall have the right to make all reasonable and just rules and regulations governing the service of water to private consumers as may be necessary for

their protection in that behalf and may enforce the observance of the same by cutting off the supply of water or otherwise, and shall have the right at all reasonable hours of the day to have access to the water pipes and metres of any taker; to protect itself from abuse and fraud, or repair or observe or remove the same, and may require all water takers to sign a contract embracing these rules and regulations.

The City of Greensboro shall protect the works and property of the grantees aforesaid in said city by suitable ordinances.

Sec. 17. The grantees aforesaid shall furnish the City of Greensboro a description and draft of its machinery, appurtenances, fixtures, location and size of piping, hydrants, storage tank, pump houses and other houses and other like information desired by the city to give the Board of Commissioners an intelligent and comprehensive idea of the extent, kind and condition of its whole water works and its connections.

Sec. 18. The grantees aforesaid shall put in gate valves in sufficient numbers to divert and control the water and have as few dead ends as possible.

Sec. 19. The said grantees aforesaid shall constantly, day and night, except from unavoidable accident, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said services, and shall maintain a head of at least seventy (70) feet in the stand pipe or storage tower, except in case of unavoidable accident or when the water is drawn off to cleanse the tank.

(33) Sec. 20. The grantees aforesaid shall furnish water supplies to the city and its inhabitants at the following maximum prices, to-wit:

Tariff of charges per annum, payable semi-annually in advance:

Banks, churches, stores, &c.	$ 5 00
Bakeries (not less than $10.00 daily average one barrel flour each	4 00
Barbers, each chair	3 00
Baths, private (hot water) each $1.00 extra.	3 00
Baths, public, each (includes hotels and boarding houses)	10 00
Smith shops, per fire	2 50
Building, brick per M., stone, per porch, 5 cents; plastering per square yard, ½ cent	
Hotel, per room	1 20

Boarding house, room rates (no charge less than $10.00), extra for each boarder, 50 cents	
Laundries and washer-women	$8 00 to 20 00
Printing offices—weekly—hands or less (each additional hand, 50 cents)	8 00
Photo. gallery	$10 00 to 15 00
Residence, for general domestic use—4 rooms or less	5 00
Residence, for general domestic use—6 rooms or less	6 00
Residence, for general domestic use—8 rooms or less	7 00
Residence, for general domestic use—10 rooms or less	9 00
Residence, for general domestic use—12 rooms or less	10 00
Residence, for general domestic use—more than 12 rooms	11 00
Restaurants	$8 00 to 15 00
Private stable—horse and carriage, each	1 50
Public stables—horse and carriage, each	2 00
Steam boiler, per horse power, up to 15, special	
Saloons, beer, &c.	10 00
Pavement washer, including street sprinkler ½ width of street, per each 25 feet front (each add. 25 feet or fraction 2.00)	3 00
Irrigation—lawns, gardens, &c., per 1,000 sq. ft. or fraction	1 50
(34) Meter measurement (no charge less than $10.00; per 1,000 gallons, 25 cents; factories, fountains, school, &c., special rates.	

And consumer shall have the right to put in a meter and pay for water at the meter rates. The grantees aforesaid shall also have the privilege of putting in a water meter and charging for the water at meter rates.

The water rents charged by said grantees to consumers for domestic and manufacturing purposes shall not exceed the average rates charged in other towns in this State supplied by a like system. The connection between the main and the consumer shall be made at the expense of the consumer and the lowest annual rate for any one consumer shall be five dollars, $5.00.

Sec. 21. The grantees aforesaid shall begin active operations in good faith on the water works in thirty days from the

time this ordinance is passed and accepted by the grantees aforesaid, and the grantees aforesaid shall have the said works completely finished by the 30th day of April, 1888, ready for tests hereinbefore provided for and for the acceptance of the City of Greensboro.

Sec. 22. The grantees aforesaid shall not employ convict labor on the works, and shall, as far as practicable, employ labor from this vicinity.

Sec. 23. The City of Greensboro shall pay for the rental of the seventy-five hydrants, hereinbefore provided for, the sum of two thousand, eight hundred and seventy-five dollars ($2,875.00), payable semi-annually, the first day of July and the 1st day of January, of each year. The first payment of the fraction to be payable the 1st day of July, 1888.

Sec. 24. At the expiration of ten years from the passage of this ordinance, and at each recurring ten years thereafter, the City of Greensboro shall have the right to purchase the said water works of said grantees at such price or on such terms as may be agreed upon; but in case the parties cannot agree as to the price and terms, the city may give three months notice to the grantees aforesaid of its desire to purchase said water works, and it shall then be the duty of each party to appoint a disinterested arbitrator, not a resident of Greensboro, and these two, if they disagree as to the price and terms of the purchase, shall call in an umpire chosen by them and the award of a majority of the three, or of the two arbitrators, shall be final and binding on the parties, and if the grantees aforesaid refuse to abide by the award, they shall forfeit all their rights under this ordinance as a contract.

The award of the arbitrators shall be in writing, and furnished to each of the parties. The city shall have the option, within ten days after the award is made, to accept or reject the purchase at the price and on the terms awarded by the arbitrators.

If the city declines to purchase, it shall pay the expense of the arbitartors, otherwise to be divided between the parties.

Sec. 25. The city shall be responsible to the grantees aforesaid for any injury negligently done to the hydrants by any of its employees.

Sec. 26. Whenever the words "Grantees aforesaid" are used, they stand for the parties to whom this franchise is granted."

STATUTE OF NORTH CAROLINA, BEING SECTION 1255 OF THE
(35) CODE OF THAT STATE.

"Mortgages of incorporate companies, upon their properties or earnings, whether in bonds or otherwise, hereafter issued, shall not have the power to exempt the property or earnings of such incorporation, from the execution for the satisfaction of any judgments obtained in the courts of the State, against such incorporation * * * for torts committeed by such incorporation, its agents or employes, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgages to the contrary notwithstanding."

ANSWER OF THE GUARANTEE AND SAFE DEPOSIT COMPANY OF PHILADELPHIA.

(36) "The answer of the Guarantee Trust and Safe Deposit Company of Philadelphia to the original bill of complaint and to the amended bill of complaint of the Guardian Trust and Deposit Company, complainant in these proceedings, respectfully shows unto your Honors:

That by way of answer to the said bill of complaint and the amendment thereto of the said Guardian Trust and Deposit Company in these proceedings filed, this respondent now, and at all times hereafter, saving to itself all manner of benefit or advantage of exception or objection that can or may be had or taken to any errors, uncertainties or imperfections in said original bill of complaint or amended bill contained, for answer thereto, or to so much thereof as this respondent is advised it is material and necessary for it to make answer to, answering, says:

First. That this respondent admits the first paragraph of the original bill of complaint and of the amended bill of complaint, and also admits the allegations of the paragraphs 2 to 7, inclusive, of the original bill of complaint, with the exception of paragraph 5 B of the said original bill of complaint, which it expressly denies, and it also admits the allegations from 2 to 6, inclusive, of the amended bill of complaint, and denies the allegations from 7 to 9, inclusive, of the said amended bill of complaint, and, further answering, this respondent says that it is a corporation duly and originally created and organized by and under the laws of the State of Pennsylvania, having its principal office and place of abode in the City of Philadelphia, within said State, and is a citizen of the State of Pennsylvania, and that the other parties to these proceedings against whom the answer and defense of this petitioner and respondent

for its interest in the premises is hereby asserted, namely: the Greensboro Water Supply Company, the defendant, and Helen G. Brown, A. M. Scales, assignee of Hodgin, Pegram and Company; A. M. Scales, assignee of A. A. Hinkle, the Southern Stock Mutual Insurance Company, and B. J. Fisher, claimants, are citizens of the State of North Carolina, and the complainant in these proceedings mentioned, the Guardian Trust and Deposit Company, is a corporation duly incorporated under the laws of the State of Maryland, and a citizen of said State, and the subject matter, claim or thing in dispute in this suit, claimed by your said petitioner, or respondent against all of the said other parties above mentioned, is of a value exceeding two thousand dollars ($2,000.00).

Second. And, further answering, this respondent says that, as set out in the third paragraph of said original bill of complaint, the said defendant, the Greensboro Water Supply Company, never received any title to the property in these proceedings mentioned, except subject to the operation and effect of the mortgage in these proceedings mentioned, from the Greensboro Water Company to this respondent, dated January 10th, 1888, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford County, North Carolina, in Book —, No. —, pages No. —, *et seq.*, and known in these proceedings as 'Complainants' Exhibit C,' and subject to the operation of which mortgage it made its conveyances to said complainant as set out in said bill of complaint; and your respondent further particularly admits and alleges that the statements and admissions of the said bill of complaint and said amendment thereto, (37) to the effect that the said deed of trust made by the said Greensboro Water Company to your respondent, was, and is, a first lien upon the property in these proceedings mentioned, and upon the purchase money and proceeds of sale of said property now paid into court, are true, as hereinafter more particularly and fully set out, and this respondent refers to and adopts the findings of the master and auditor of this court, Clement Manly, Esquire, in support of the allegations of this answer.

Third. And, further answering the said bill of complaint, and the said amended bill of complaint, this respondent avers that, by the terms of the mortgage to it by the Greensboro Water Company, a body corporate, dated January 10th, 1888, and hereinbefore described as 'Exhibit C,' the said property of the Greensboro Water Company, being the property in these proceedings mentioned, and heretofore sold by the order of this court, was conveyed to your respondent in trust to secure the payment according to the terms thereof, of fifty first mortgage

bonds, each of the denomination of one thousand dollars ($1,000), and particularly mentioned and described in said mortgage; that said first mortgage bonds of the Greensboro Water Company were duly issued, sold and negotiated by the said Greensboro Water Company for value, about the date of the same, and are now all outstanding having been purchased for value in the hands of the holders thereof, as appears by the testimony heretofore taken by said auditor and master of this court, and by the findings of fact heretofore made and reported by him; that the said bonds are not overdue or in default according to the terms thereof, and that the interest upon the same has been regularly paid according to the terms of the coupons, until the date of the last coupon falling due August 1st, 1901, the money to pay which interest, however, was fully earned by the property operated by the receiver in this cause, as appears from his accounts and report heretofore made to the court in these proceedings, and now ready to be made and reported, but that the said receiver has withheld payment of the said coupons until the further order and direction of this court; that the said bonds are not, therefore, in default as to the principal or interest thereof, nor have the holders thereof or your respondent, as their trustee, ever claimed any default or asked or invoked the aid of a court of equity to declare the same, or to execute any remedy for such default under the terms of the deed of trust, but that the holders of a large majority of said bonds, and, in fact, the holders of all that have been communicated with, (38) have expressed their willingness to receive the principal of said bonds, with interest accrued to date of such payment, and to surrender their said bonds to be cancelled by order of the court in order to enable the said City of Greensboro, the purchaser in these proceedings mentioned, to receive a full and complete title to the property, so as aforesaid ordered to be sold to said city by this court, and the other parties to the cause to obtain an immediate distribution of the said fund in court, subject to the lawful rights and priorities of the said respondent, the trustee for the bondholders under the said deed of trust, to have and receive payment in full of the value of its liens for the principal amount and the interest of the said issue of bonds secured by said deed of trust; that your said respondent specially calls the attention of the court to the fact that, under the terms of the said bonds and the said deed of trust, the said bondholders are the owners of an investment far exceeding in value the said principal sum and interest accrued to date set out in said bonds, but are entitled of right to hold and enjoy the said bonds and their investment in the same until the full period of maturity of their said bonds, and that their said investment cannot be replaced by the amount of money which they are thus asked to receive,

in order to enable the purchaser and the other parties in these proceedings mentioned, to obtain what is asked by them of this court, but that this respondent in behalf of the said bondholders, submits itself to the jurisdiction of this court, and appears in this court in accordance with the summons and order of the court in the premises, with full confidence that this court will accord it, and the bondholders represented by it, full justice and equity, and will determine and adjudge that the said respondent is entitled in behalf of the said bondholders represented by it to a first lien upon the money, the proceeds of the property sold by the court in this cause, the immediate distribution of which is asked by all parties to this cause other than by this respondent, which is assured and pleads and prays that this court will not require it to surrender the bonds of the said bondholders represented by it as trustee, except upon the terms and conditions to which said bondholders have voluntarily agreed, in case the surrender and cancellation of said bonds was deemed essential by the court for the benefit of the other parties who have voluntarily appeared in these proceedings.

Fourth. And this respondent particularlp alleges and calls the attention of the court to the facts as set out in the record, (39) that the claims of all the other parties to these proceeding to the fund now in the hands of the court in this cause, the proceeds of the sale of the property over which this court had, and has ever had, exclusive jurisdiction, are made against this respondent by parties who have appeared voluntarily in these proceedings to assert their clai.ns, right and interest, and have, and are now asserting their right and interest and claim, and who require that this respondent be divested of its first and prior lien which it held upon the property heretofore sold in these proceedings for their benefit, and to enable them to have immediate distribution of said fund in satisfaction of their said claims; that, with the exception of the claim of the said Guardian Trust and Deposit Company, the complainant in these proceedings, which is made altogether subject to the prior right of your respondent to the full extent of its lien to secure the bonds issued under the deed of trust to it hereinbefore mentioned, the said other claimant and parties to these proceedings all claim to deprive your said respondent of its rights in the said premises, which accrued to it upon the execution of the said deed of trust made to it by the said Greensboro Water Company, dated January 10th, 1888, by reason of certain alleged negligent breaches of a contract made *been* the Greensboro Water Supply Company, the defendant in these proceedings mentioned, and the City of Greensboro, to-wit: in the year 1898 and 1899, with which body corporate at the dates of the commission of the said wrongs alleged in said

causes of action, your respondent or its assignor, the Greensboro Water Company, never had any relation, contractual or otherwise, or transaction or connections whatsoever, nor can it be affected by the acts, negligencies or defaults of the said Greensboro Water Supply Company to the said City of Greensboro under said contract, or to any person whatsoever, and cannot, by reason of such acts, negligences and defaults of the said defendant, the said Greensboro Water Supply Company, be deprived of its rights in the property aforesaid or the proceeds of sale thereof, held by it in solemn trust, secured by the deed of trust aforementioned.

Fifth. That, further, with the exception of the claims of C. J. Gorrell, in these proceedings mentioned, which was prosecuted to judgment in the Superior Court of Guilford County, North Carolina, prior to the appointment of the receiver in this cause and the assumption of the jurisdiction of this court over the property in these proceedings sold, the said defendants, viz.: all the other parties to these proceedings, except the complainant (40) in these proceedings mentioned, instituted or prosecuted their said claims to judgment in the Superior Court of Guilford County, without making the receiver of this court a party to their proceedings, and without the leave of this court being had and obtained, notwithstanding the appointment of this receiver in these proceedings by this court, and the assumption by this court of the jurisdiction over the property and premises and the funds, the proceeds thereof, in these proceedings mentioned, for the express purpose of determining all the indebtness of the said defendant company, the Greensboro Water Supply Company, and the lawful liens and priority of the various classes of cerditors, and notwithstanding that this court, according to the prayer of the bill in these proceedings, had expressly enjoined and prohibited all persons whatsoever, from interfering with said receiver as to the possession of the property of said company, etc., or from suing said receiver in any court of law or under form of any proceeding at law, except upon application to this court, and obtaining permission to take such action, and that such proceedings were adopted by the said other parties to this cause with the express purpose, object and intention of obtaining a different construction, jurisdiction and application of a different rule of law from that which was known to be the rule and law of this court, to their alleged claims against said defendant company, over whom and over whose property this court had taken complete and final jurisdiction for the purpose of allowing and ascertaining all rightful claims; that not only had this court assumed such jurisdiction over the said defendant company and its property and premises, but that

the said jurisdiction was vested, and, under the terms of the bill in this cause, was alleged to be in this court by virtue of the citizenship of the parties, both plaintiff and defendant, and that it is equally and continuously in this court by reason of this citizenship, when the controversy is seen to be between the original complainant in this cause and the said defendant and the original complainant in this cause and all the other defendants and claimants, or between all other parties to this cause seeking to enforce their rights against this respondent.

Sixth. And your respondent particularly avers and charges that the validity of the rights and actions and claims of said several claimants, Helen G. Brown, A. M. Scales, assignee of A. A. Hinkle; A. M. Scales, assignee of Hodgin, Pegram & Company, and the Southern Stock Mutual Insurance Company (41) and of B. J. Fisher, reported by the special master in these proceedings appointed, as filed in this cause against the said Greensboro Water Supply Company, the defendant in these proceedings mentioned, when made and asserted against your said respondent, who was in nowise a party to said proceedings, and who was not even a party to these proceedings until the process of this court was served upon it and returned the 5th day of August, 1901, is solely to be determined by this court, and that such claims are in no respect valid claims against said defendant in these proceedings mentioned, and that it could not be made and never could have been made liable upon such a cause of action as is set out in the records relied upon by said claimants in this court, or under the law and judicature administered by the Federal courts, and that further and particularly upon the examinations of the records of such claims, it will be seen that the causes of action therein set out are not of a nature which can be enforced against the fund in these proceedings, the proceeds of the property sold by the process of this court in these proceedings, at the expense of, or prior to, or in any way to the detriment and diminution of the lien of this respondent, given to it and secured to it under the deed of trust made to it by the Greensboro Water Company, dated January 10th, 1888, viz.: Exhibit C, for the benefit of the holders of said bonds issued under said deed of trust.

Seventh. And your respondent respectfully submits to the court that it will not permit it to be divested of the lien given to it for the benefit of the holders of the bonds mentioned in said deed of trust made to your respondent, except upon equitable terms, such terms being full value and compensation for the right and lien held by your respondent, or a sum which it may be willing to receive as the equivalent of such value or compensa-

tion as hereinbefore mentioned, and that this court will, in the exercise of its jurisdiction, which belongs to it exclusively as between the parties claiming said fund, both by reason of the citizenship of the opposite parties and by reason that it had, and has, full and exclusive jurisdiction of the property and of the proceeds of sale in these proceedings mentioned, examine and determine the issues between the said other claimants and your said respondent, under and according to the rules of law and the system of judicature and procedure which is binding upon this court, and will determine that this respondent is in no way liable or responsible, or subject to be deprived of its prior right to the full amount of its said lien in the said fund in the hands of the court, at the claims of the said claimants next hereinbefore mentioned, by reason of any right, claim or demand whatsoever against the said defendant, the Greensboro Water Supply Company, and especially by reason of the alleged claim or right or cause of action against said company set out in the records of the said claims heretofore filed in these proceedings; and that this court will not order this respondent to be divested of its said lien or claim, or bonds of the said bondholders represented by your respondent to be delivered up and cancelled except upon the payment of the full amount of the principal of said bonds and the interest accrued on each of said bonds, to the date of such payment of said bonds upon the deposit of the same in this court.

And, having fully answered, this respondent humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained."

DECREE, 10TH OF OCTOBER, 1894, ENTERED IN THE ORIGINAL CAUSE OF MIDDENDORF *v.* GREENSBORO WATER COMPANY, FILED HEREIN AS A PART OF THE RECORD.

"Order Directing Sale of the Property.

(42)

"This cause coming to a hearing upon the bill of complaint, the answer of the trustees, R. R. King and Archibald H. Taylor, and the answer of the defendant, the Greensboro Water Company, and the reports of the receiver, James D. Glenn, filed in this cause to date, and all other proceedings in said cause being duly read and considered, upon consent of the complainants by their counsel, Archibald H. Taylor, and of the defendant, the Greensboro Water Company, by its counsel, Robert R. King, the court doth order, adjudge and decree as follows, viz.: It appearing to the court that the plaintiffs, the second mortgage bondholders, are entitled to have a decree of foreclosure of said mortgage for defaults in the terms thereof,

and a sale thereunder, subject only to the lien of the first mortgage in these proceedings mentioned, the said Robert R. King and Archibald H. Taylor are hereby appointed commissioners to sell the mortgaged property in these proceedings mentioned, being all the property, rights and franchises of the Greensboro Water Company, and all the property and rights in the hands of the receiver, James D. Glenn, heretofore appointed by the court in this cause, and such sale shall be subject to the lien of the first mortgage bonds under the first mortgage as being the same in these proceedings mentioned, but the rights of the defendant body corporate, and of all other persons or bodies corporate claiming under the said defendant company, shall be and are forever barred and discharged, and the course and manner of said sale shall be as follows: said commissioners shall first give not less than three months notice of the time, place and terms of sale by advertisement at least twice a month in some newspaper published in Guilford county, North Carolina, and in some newspaper published in the City of Baltimore, Maryland, and such other advertisement as may to said commissioners seem proper, and said sale shall be at public auction to the highest bidder in the City of Greensboro, North Carolina, and the terms of sale shall be as follows: the purchaser being the highest bidder shall pay to the said commissioners at the time of the sale cash on account of the purchase money for the property to the amount of five hundred dollars, and immediately upon the ratification of the sale, which may be reported to this court for ratification in vacation or during term immediately after the sale, said purchaser shall pay or deliver to said trustees on account of said purchase money cash or receiver's certificates now issued and outstanding under the orders of this court in this cause to the full amount of said receiver's certificates, and the balance of said purchase money shall be payable and dischargeable in money or in evidences of debt due by the defendant company, be the same due by second mortgage bonds, judgments or open accounts, ratably and proportionately, in the order in which the same shall be reported by the special master heretofore appointed in these proceedings and confirmed by this court, to the full extent of the balance of said purchase money, and the balance of said purchase money, if any, shall be paid and distributed to the stockholders of said defendant company ratably and proportionately according to their respective holdings, and said commissioners, prior to the day of sale, shall give bond, with security to be approved by a judge or clerk of this court, conditioned for the faithful performance of their duties under this decree, in the penalty of five thousand dollars, and it is further (43) declared not to be the intent and effect of the terms of this decree to determine and establish in any way the order of

the rights and priorities of the parties to this cause, or the priority of lien of any claimants or intervenors against the property in these proceedings mentioned, or the proceeds thereof to be brought into court, and the cause is continued for further proceedings. In open court October 10th, 1894.

ROBERT D. PICK,
U. S. Judge."

(44)

EXTRACT FROM DEED 30TH APRIL, 1896, FROM ROBERT R. KING AND ARCHIBALD H. TAYLOR, COMMISSIONERS IN THE LAST-NAMED CAUSE OF MIDDENDORF v. GREENSBORO WATER COMPANY, TO HUGH L. POPE, WHO IN TURN CONVEYED THE PROPERTY, FRANCHISES, &C., SOLD THEREIN TO THE GREENSBORO WATER SUPPLY COMPANY.

"To have and to hold the property, rights, franchises, and privileges hereby specially mentioned to be conveyed unto and to the use of the said party of the second part, his assigns and associates as he may hereafter declare the same by deed or other conveyance and allotment, whether by the name of the Greensboro Water Supply Company or by such other corporate name as may be lawfully assumed and declared by the said party of the second part and his associates as they may or become incorporated according to law. Subject, however, to the operation and effect of a mortgage dated the 10th day of Jan'y, eighteen hundred and eighty-eight, and executed by the Greensboro Water Company unto the Guarantee Trust and Safe Deposit Company and recorded among the land records of Guilford county, North Carolina, in the office of the Register of Deeds of said county, purporting to secure an issue of fifty thousand dollars ($50,000) of first mortgage bonds of said company.

In witness whereof the said parties of the first part have hereunto set their hands and seals this 30th day of April, in the year one thousand, eight hundred and ninety-six."

DECREE OF THE COURT BELOW APPEALED FROM.

(45) "This cause coming on to be heard, and having reference to the opinion filed directing a decree to be entered giving priority to the lien of the judgments of B. J. Fisher for $25,000.00; A. M. Scales, assignee of A. A. Hinkle, $3,200.00; A. M. Scales, assignee of Hodgin, Pegram & Co. for $1,800.00, and Helen G. Brown for $3,000.00 against the Greensboro Water Supply Company, over the lien of the mortgages therein referred to.

Upon consideration, it is ordered, adjudged, and decreed by the court that the said judgments are entitled to priority of payment over and above the lien of the mortgages set out and described in the papers, writings and records in the proceedings filed in this cause:

Now, upon motion of counsel for said judgment creditors, it is ordered and decreed that out of the monies and funds now in the custody of this court, arising from the sale of the property of the Greensboro Water Supply Company to the city of Greensboro, and held for distribution under the orders of this court, that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of twenty-five thousand ($25,000) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the Superior Court of the county of Guilford, North Carolina; to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of three thousand and two hundred ($3,200) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to A. M. Scales, assignee of Hodgin, Pegram & Co., or his attorneys of record, the sum of one thousand and eight hundred ($1,800) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to Helen G. Brown, or her attorneys of record, the sum of three thousand ($3,000) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court, said interest on the said several judgments to be at the rate of six per centum per annum until paid.

It is further ordered that the costs, both in the State Court and in this court, incident to and on the said several judgments, be likewise paid by the said receiver out of the said funds.

And this cause is retained for further orders and directions.

Let this decree be enrolled.

This March 24, 1902."

As witness our hands this 14th day of July, 1904.

NATHAN GOFF.
Senior Circuit Judge.

THOS. R. PURNELL,
Dist. Judge, E. Dist. N. C.

EDMUND WADDILL, JR.,
Dist. Judge, E. Dist. Va.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the original certificate of questions or propositions of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 21st day of July, A. D., 1904.

[Seal of United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY, Clerk,
U. S. Circuit Court of Appeals, 4th. Ct.

By CLAUDE M. DEAN,
Deputy Clerk.

And on another day, to-wit: July 29, 1904, the certificate of this court is transmitted to the Supreme Court of the United States, at Washington, D. C. in due form.

Clerk's Certificate.

UNITED STATES OF AMERICA, Fourth Circuit, } ss:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said circuit court of appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, this 7th day of June, A. D. 1905.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

[Endorsed:] File No. 19,436. Supreme Court U. S. October term, 1905. Term No. 75. The Guardian Trust & Deposit Co., *et al.*, vs. B. J. Fisher, *et al.* Exhibit to motion to bring up entire record & cause. Filed June 9th, 1905.

Supreme Court of the United States, October Term, 1905.

THE GUARDIAN TRUST AND DEPOSIT COMPANY ET AL. vs. B. J. FISHER ET AL. } No. 75

On consideration of the petition for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by the court that said petition be, and the same is hereby, granted, and that the record presented with the petition stand as a return to the writ.

October 16, 1905.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Guardian Trust and Deposit Company and The Guarantee Trust and Deposit Company are appellants and B. J. Fisher

et al., are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the western district of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 19,436. Supreme Court of the United States. No. 75, October term, 1905. The Guardian Trust & Safe Deposit Co., *et al.*, vs. B. J. Fisher *et al.* Writ of certiorari.

CLERK'S COPY.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904 1905.

No. 236 75

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, APPELLANTS,

versus

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED Aug 8. 1904

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM,

No.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, APPELLANTS,

versus

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 456.

GUARDIAN TRUST AND DEPOSIT CO. AND GUARANTEE TRUST AND SAFE DEPOSIT CO. OF PHILADELPHIA, APPELLANTS,

versus

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE AND OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

CERTIFICATE OF QUESTIONS BY THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, TO THE SUPREME COURT OF THE UNITED STATES.

Filed July 20, 1904.

This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions arising from the record, and the doubt which the court has as to the correct decision thereof, that three questions raised on said appeal be certified to the Supreme Court of the United States for its consideration thereof; and that accompanying said questions, there shall be certified a statement from which such questions can be understood; which statement and questions are as follows:—

Questions.

First. Whether the fact, that under the decision of the Supreme Court of North Carolina, an action can be and is maintained, by a citizen and tax-payer of the State, against a water company organized under the laws of the State, contracting with (2) the city, (of which city said citizen is a tax payer and inhabitant) to furnish the city and its inhabitants with water for domestic and public purposes, and also for the purpose of extinguishing fire, for damages occasioned by the burning of the building within the city belonging to such citizen and tax payer, because of the alleged negligent failure to supply and furnish sufficient water and pressure from its engines and pumps to extinguish fires, the Circuit Court of the United States, sitting in equity in such case, in a suit for foreclosure of a mortgage given by the water company, should recognize the existence of such cause of action, and whether or not it is concluded by the rendition of a final judgment in the State Court in favor of the persons whose property has been destroyed by fire.

Second. Whether, because in said suit it was determined by the Supreme Court of the State that the judgment in such action was based upon a cause of action declared upon in tort, and not in contract, said Circuit Court of the United States is bound, and cannot for itself determine the question of whether the cause of action, if existing at all, was one arising in tort, or contract?

Third. Whether, assuming the existence of such cause of action, and that the same may be maintained in tort, a final judgment in such case against the water company obtained in the courts of North Carolina, is protected by section 1255 of the Code of that State, and should have priority in the distribution of the assets of the water company over its mortgage bonds theretofore issued.

Statement from Records.

(3) The foregoing questions arise under a bill for foreclosure of the mortgages, and the appointment of a receiver, filed in the United States Circuit Court for the Western District of North Carolina, by the Guardian Trust and Deposit Company, a corporation of the State of Maryland, against the Greensboro Water Supply Co., a corporation of the State of North Carolina.

Bill of Complaint.

(4) "First. That the complainant, your orator, is a body corporate, duly incorporated under an Act of Assembly of the

State of Maryland, and the laws of said State, originally under the name of the Guardian Security, Trust and Deposit Company, and performed and accepted all corporate acts under that name prior to the year 1898, but heretofore and since January 1st, 1898, its corporate name was changed by Act of Assembly of said State of Maryland, to the Guardian Trust and Deposit Company, and said complainant, your orator, is a citizen and resident of the State of Maryland, and the defendant herein named, the Greensboro Water Supply Company, is a body corporate, duly incorporated under the laws of the State of North Carolina, and is a citizen and resident of said last named State, having its principal office within said State and Judicial District, and that the subject matter, property and claim or thing in dispute in this suit is of value exceeding two thousand dollars, and within the jurisdiction of this Honorable Court.

Second. That heretofore, to-wit: July 1st, 1896, the said defendant, the Greensboro Water Supply Company, executed unto your orator, as trustee as therein set out, a mortgage or deed of trust of said date, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford county, North Carolina, in Book No. 102, page 764, etc., which mortgage is herewith filed and designated "Complainant's Exhibit No. 1," and is prayed to be taken as part of this bill; and that your orator, the complainant, as appears by said mortgage, in the course of the performance of the business and duties for which it was incorporated, accepted said trust by said deed conferred, and bound itself to carry out the trusts and duties thereby imposed.

Third. That said mortgage or deed of trust was executed to secure an issue of one hundred and ten bonds of the denomination of one thousand dollars each, Nos. 1 to 80, inclusive, being denominated Series A. bonds, and having a prior lien upon both the property, revenues and earnings of said defendant company, and Nos. 81 to 110, inclusive, being denominated Series B bonds, and having a lien upon said property and revenues next after series A bonds; that of said Series A bonds, fifty, being the Nos. 1 to 50, inclusive, were given by the terms of said deed to your orator to be held by it in trust to secure the payment, redemption or retirement, prior to maturity, of fifty bonds of the denomination of one thousand dollars each, issued under a mortgage or deed of trust of the Greensboro Water Company, a body corporate, dated, to-wit: January 10th, 1888, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford county, North Carolina, which mortgage or deed of trust, and the bonds secured thereby, are in full operation and

effect and outstanding, and, except subject to the operation of (5) which mortgage, the defendant, the Greensboro Water Company, never received any title to the property in these proceedings mentioned, and subject to the operation of which mortgage it made its conveyance to your orator as herein set out. And the said fifty bonds, Nos. 1 to 50, inclusive of Series A are now in the possession of your orator, and are held by it according to the terms of said deed of trust or mortgage, but have not otherwise been issued, nor have they been sold or negotiated to any person whatsoever.

Fourth. That, therefore, the bonds which have been sold and negotiated and are issued and outstanding under the said mortgage consist of thirty bonds of Series A, Nos. 51 to 80, inclusive, each of the denomination of $1,000.00, and thirty bonds of Series B, each of the denomination of $1,000, and numbered 81 to 110, inclusive; and your orator has been requested by the holders and owners of the majority of each of said classes of bonds secured by said mortgage, to file this bill of complaint and invoke the action of this court herein prayed, in the premises.

Fifth. And your orator particularly avers and charges that defaults have occurred and taken place in the terms of said mortgage or deed of trust, which it was the object and intent of said mortgage to provide against and secure, and upon the happening of which, it is provided by said mortgage, that it should be the right and duty of your orator to re-enter upon and possess said property, or to sell the same with or without re-entry upon and possession of the same, and always to have a receiver appointed to take the same into his care, custody and management under the direction of a court having jurisdiction of the premises, until the said property mentioned in said mortgage should be sold in accordance with the terms of said mortgage or otherwise, under the direction of said court, as might be deemed advisable by said court for the protection of the interests of said bondholders and all others interested in said property, and that the defaults or breaches of the terms of said mortgage which have occurred, are all those mentioned in and provided against in clause five (5) of said mortgage, viz.:

(a) The semi-annual interest upon the outstanding bonds of Series A and Series B, falling due Aug. 1st, 1900, was not paid out of the moneys, funds and revenues of the said mortgagor, the defendant corporation, but from money borrowed to pay the same, which money is still due and unpaid, and assets (6) of the corporation upon which your orator has a lien as

security for said bondholders were pledged to raise the money paid out on said coupons, which was a virtual breach and default under said mortgage, and has continued more than one month.

(b) The semi-annual interest falling due August 1st, 1900, upon the fifty thousand dollars of bonds known as the first mortgage bonds of the Greensboro Water Company, being a lien as aforesaid by the terms of the deed of trust made by said Greensboro Water Company prior to the acquisition of this property by the defendant, were not paid August 1st, 1900, out of moneys in the treasury of the defendant company, but out of the moneys borrowed by said defendant company as next above set out, thereby subjecting the property of the defendant company to a default under the terms of said prior mortgage, and thus depriving the holders of the bonds issued under the terms of the mortgage to your complainant of the security guaranteed to them under said mortgage.

(c) Lawful charges and taxes due and payable by said defendant company are now in arrears to a considerable amount, to-wit: to the amount of $1,000.00.

(d) A judgment lien of the amount of $5,000 upon a judgment obtained at the suit of one Gorrell in the Superior Court of Guilford county, was obtained, and execution issued therefor, and levied upon all the property and franchises of the defendant company, which execution was stayed and superseded upon the giving of a bond with security in the penalty of $6,000, but the surety, upon said supersedeas bond, the Fidelity and Deposit Company of Maryland, *is* now by law, and as a condition of joining in such bond, became substituted and subrogated to all the rights of said judgment creditor and in a position to enforce said judgment lien at any time, and as a consequence of such judgment and execution the Judge of the Superior Court of Guilford county appointed a receiver for all the property of the defendant company, which receiver was only discharged upon giving the bond as aforesaid, and may be reappointed by said court at any time upon the instance of the Fidelity and Deposit Company of Maryland, standing in the place of said judgment creditor, Gorrell.

(e) Besides the said claim of the said Gorrell reduced to judgment as aforesaid, said defendant company is harrassed and threatened with many other claims, amounting in the aggregate to $30,000, for alleged damages occurring by fires, (7) which said claimants allege it was the duty of said de-

fendant company to prevent or extinguish under the terms of some alleged contract made with the city of Greensboro for their benefit, which claims, if reduced to judgment, said claimants allege to be prior to the lien of the bonds secured by the deed of trust or mortgage made to your orator, but wrongfully, as your orator is advised and charges, but, nevertheless, your orator is entitled, and so claims and charges, to have this court take jurisdiction of the property and assets of this company and determine the rightful lien and priorities, if any, of one creditor over another, and particularly to enforce the lien of the mortgage or deed of trust made to your orator for the benefit of the holders of the bonds secured thereby.

(f) And, particularly, that said defendant company is indebted to several and various persons and corporations in several sums of money for work done and materials and supplies furnished upon its order and for its benefit, over and above the mortgage indebtedness above referred to, the aggregate of the principal of which mortgage indebtedness is one hundred and ten thousand dollars, and there is no money in the treasury of the company to pay such floating indebtedness, nor the interest upon said mortgage bonds; and said defendant company is, in law and fact, insolvent, so that its assets should be taken into the care and custody of this court and operated by this court for the benefit of its several classes of cerditors, and ultimately administered and distributed according to the lawful priorities of said creditors.

Sixth. And your orator particularly avers and charges that by the fifth clause of the mortgage or deed of trust, Exhibit No. 1, it is made the express duty of your orator, whenever it shall appear to such trustee or to the holders of the bonds secured thereby, proper and desirable for the protection of the interests and estate conveyed in trust, or for the more perfect effectuation of the trusts and purposes declared in said deed, to apply to a court of equity of any of the States, or of the United States, having general jurisdiction over the subject matter, to assume jurisdiction of the trust, and to order, decree and carry out the remedies in said mortgage proposed and accorded, as well as such other remedies as the court may deem needful and proper for the protection and benefit of the holders of the bonds secured in said mortgage, and that the assent of said defendant company is therein pledged and given finally in advance to the immediate appointment of a receiver by the court upon such application, and that, in view of the facts herein before stated, and (8) other facts known to your orator, and said bondholders, showing the danger of waste, injury and dissipation of the property

composing said truste estate, your orator and said hondholders deem the immediate appointment of a receiver to hold and operate said property under the direction of the court in the premises necessary for the preservation and protection of said property, and to the full and proper exercise and execution of the rights and remedies accorded by said deed of trust. And, further, that upon consultation with the members of the board of directors of said defendant company, they have, just prior to the filing of this bill, acknowledged the existence of the causes for the immediate appointment of a receiver, and assented to such action and its necessity.

Seventh. Wherefore, in consideration of the premises, your orator prays your honors to pass an order, or orders, and decree of the court to the following purpose and effect.

(1) Appointing immediately a receiver of this court to take into his custody, possession and management, all the property, assets and rights of the defendant, the Greensboro Water Supply Company, and to carry on the operation and business of said company under its franchises, and under the direction of this court, and to collect all the rents, profits and revenues of said company, and all moneys now due and to become due said company, and to sue in his name, as said receiver, in this court, or any court of the United States, or of any of the States having jurisdiction in the premises, for the possession or recovery of all property, money, assets, or any other thing belonging to said company, or to which said receiver may be entitled thereunder.

(2) Enjoining and prohibiting any and all persons and corporations whatever from interfering with said receiver so as aforesaid appointed by this court, either as to his possession of the property of such compauy, or the management thereof, and especially from suing said company, or, by any proceeding under the form of law, attempting to deprive said receiver of the possession or right to the possession of all the assets, rights, credits and moneys of said defendant company, except upon application to this court in this proceeding, which possession and rights and disputes relative thereto, this court is competent to determine, and will of right determine.

(3) Referring the papers and proceedings in this cause to a special master or auditor to be appointed by this court to take (9) an account, and to make a report to this court of all the property, assets, rights, and franchises of the defendant company, and the value thereof, and all the indebtedness of said defendant company, and the lawful lien and priority of the

various classes of creditors, and whatever else such special master may be requested to report by the parties to this cause.

(4) Passing a final decree or order in the premises, selling, or otherwise disposing of the property and assets of said defendant company, so as to execute fully and fairly for the benefit of the holders of the bonds secured by the mortgage in these proceedings, the trusts declared therein for their benefit, either according to the terms of said mortgage or according to the course and custom of this court, as may appear proper to this court.

(5) Granting such other and further relief as may to this court seem fit and may to your orator's case seem necessary, in view of the facts and circumstances herein alleged and which may be made to appear at the final hearing of this cause.

And, further, to grant the writ of subpœna directed to the said defendant, the Greensboro Water Supply Company, to be served upon its president or other officer commanding said defendant on or before a day therein named, to appear and answer (an answer under oath being expressly waived) the matters and facts herein alleged against it, and show cause, if any there be, why a decree should not be passed as prayed.

And will ever pray."

STATEMENT "A."

(10) To this bill, an answer was filed by the Greensboro Water Supply Company, admitting the matters and facts alleged in said bill, and consenting to the appointment of receivers therein prayed for; and an order was subsequently duly entered authorizing the sale of the mortgaged property, at the price of $75,000.00; and upon confirmation of the same, by an order filed July 27th, 1901, it provided for the assertain of claims upon said property against the fund under the control of the court.

EXTRACT FROM DECREE FILED JULY 27TH, 1901, LAST REFERRED TO.

(11) "And the said receiver is hereby directed and ordered to retain the said purchase money so as aforesaid ordered to be paid to him, in his hands, subject to the further order and direction of this court, and pending the determination by this court of the claims of all parties whatsoever having any claim in or a right to or a lien or incumbrance upon the property so as aforesaid sold and ordered to be conveyed, or to the proceeds of

sale thereof. And meanwhile said receiver shall deposit said money at interest upon the best terms obtainable by him in such lawful depositories as may be designated and approved by the court.

And, further, all the said parties to this cause and all persons who have intervened or appeared herein on account of any interest claimed in the premises, and all persons whatsoever claiming any right, title or interest in, or lien upon the property hereby sold and ordered to be conveyed are forever prohibited and enjoined from interfering with the possession, title, enjoyment, management and control of the said property by the said purchaser, the City of Greensboro, to whom the same is ordered to be conveyed, by any act or proceedings whatsoever, in any court of any jurisdiction, or in any manner whatsoever, but all such persons and all persons having or claiming any right, title or interest in, or demand or lien upon the said property hereby sold and ordered to be conveyed, or the proceeds of sale thereof, are hereby ordered and required to file such claim or demand, if not already filed or claimed in these proceedings, by petition in these proceedings for the consideration and action of the court thereon, within sixty days of the date hereof, or to be forever barred of all such right, claim or demand, and the receiver of this court is hereby ordered to give notice to this effect, by publication once a week for four weeks in the Greensboro Daily Record, of the terms of this order, and that copies of this order be served personally on Helen G. Brown, A. M. Scales, assignee, A. A. Hinkle, B. J. Fisher and the Southern Stock Mutual Insurance Company of Greensboro, N. C."

(12) STATEMENT "B."

The questions in this case relate to the proper ditribution of the fund under the control of the Court, and the priority of claims thereon. The trustees of the two mortgages claim that the fund must be applied towards the satisfaction of their mortgages, according to their priorities, and that only the balance remaining can be applied to the payment of the judgments; whereas, the intervenors, who are judgment creditors of the Greensboro Water Supply Company, insist that under the statute law of North Carolina, in force when the mortgages were executed, and which must be read as though incorporated in the mortgages, priority is given to judgments of the class to which their judgments belong, over any mortgages executed by the defendant corporation; the statute under which they claim being in force at the time of and prior to the execution of either of said mortgages. The intervenors, pursuant to leave and re-

quirement as aforesaid, duly appeared in the cause, presenting the question of the priority of said judgments; as did also the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee under the first mortgage given by the Greensboro Water Company, theretofore regularly made party to the cause, file its answer controverting the position taken by the judgment lienors aforesaid; which was likewise done by the complainant trustee under the second mortgage given by the Greensboro Water Supply Company. The petition of intervention of B. J. Fisher, and the judgments and pleadings under which the same was procured, to be hereinafter set out in full, fairly presents the issues raised by the several judgment lienors; and the answer of the Guarantee Trust and Safe Deposit Company sets forth the question raised by the bondholders.

(13) APPEARANCE OF B. J. FISHER.

"For answer to the rule to show cause issued by this Honorable Court on the 29th day of July, 1901, 'Why the City of Greensboro shall not comply with its proposition to purchase what is known as the Greensboro Water Works, etc., and especially why the said city shall not take a deed for said property, and pay over the purchase price proposed and accepted by this court,' heretofore served upon him, B. J. Fisher, a judgment creditor of the above named defendant company, reserving to himself, every and singular, all rights or lien, or other rights, or interests, which have heretofore, or do now exist, or attach to his said judgment, or are incident thereto, by virtue of the laws of the State of North Carolina, or otherwise, respectfully showeth unto your Honors:

1. That, in the month of June, 1899, the defendant corporation, then engaged in the business—for compensation—of furnishing to the City of Greensboro, and the inhabitants thereof, the necessary supply of water for domestic and fire purposes, negligently failed to perform the duty and obligation imposed upon it, whereby the property of the said B. J. Fisher, an inhabitant and tax payer of the City of Greensboro, was destroyed by fire for lack of water, and water pressure, to extinguish the same, and he, the said B. J. Fisher, was greatly damaged by the tortious negligence and carelessness of the said company.

2. Subsequently thereafter, to-wit: on the 20th day of (14) July, 1899, the said B. J. Fisher began a civil action in the Superior Court of the county of Guilford, State of North Carolina, against the defendant corporation for the re-

covery of damages for the tortuous injury sustained by him, by reason of the negligence of the defendant corporation; and sued out a summons in the Superior Court, returnable at the —— term, 1899. The defendant corporation duly entered an appearance and filed answer to the complaint of the plaintiff, and the trial of the cause, in the due course of the court, was continued from term to term, until the special term of said court held in January, 1901, when the case was regularly tried before a jury upon issues submitted, which issues were found by the jury in favor of the plaintiff, B. J. Fisher, and against the defendant corporation, and assessed his damages in the sum of $25,000, upon which verdict the court rendered a judgment (reciting the issues so found by the jury) in favor of the plaintiff and against the defendant corporation in the sum of $25,000. The plaintiff appealed to the Supreme Court of the State from the judgment thus rendered, upon the ground that he was entitled to a judgment for tort against the defendant corporation, which contention was sustained by the Supreme Court of the State, and, at the February term, 1901, of said Supreme Court, a judgment final for tort was rendered by said court in favor of the plaintiff, Fisher, a copy of which judgment has heretofore been filed with the special master in this case, and likewise attached hereto and prayed to be taken as part of this answer.

3. That subsequent to the institution of the said suit by the plaintiff, Fisher, against the defendant corporation, and before the trial of the cause, as aforesaid, to-wit: on the 19th day of September, 1900, the defendant corporation was placed in the hands of R. R. King, Esq., as receiver, who, prior to his appointment as receiver, was counsel for the defendant corporation in said suit with Fisher, and tried the case at the special term, January, 1901, as such counsel, and likewise participated in the argument on appeal in the Supreme Court of the State at Raleigh.

4. That the judgment of the said Fisher was obtained and acquired before a court of competent jurisdiction, both as to the parties and the subject matter in controversy, and, as he is informed and believes, in law, is conclusive.

5. That under Section 1255 of the Code of North Carolina (it being an act of the General Assembly of the State passed at its session in 1879) mortgages made by an incorporated com-
(15) pany upon its property or earnings, whether in bonds or otherwise, thereafter issued, shall not have power to exempt the property or earnings thus mortgaged from execution or satisfaction of any judgment obtained in the courts of this State

against said corporation for torts committed by it, its agents or employees, for injury to property. That the judgment of the said B. J. Fisher is for a tort for injury to his real property.

6. That the mortgage under which the bondholders claim, and for the foreclosure of which the bill of complaint in this action is filed, were made and executed by the Greensboro Water Company and the Greensboro Water Supply Company, both State corporations, and were so made and executed subject to the legislative enactment above referred to, and by operation of law are void as to the judgment of the said Fisher.

7. That on the —— day of February, 1901, the said judgment of the said Fisher was duly docketed in the Superior Court of Guilford county aforesaid, and from that date became a lien on the water works property, which lien, it is respectfully submitted by the said Fisher, has a priority over the bonds issued in pursuance of the mortgages above referred to, and any other mortgage or mortgages which may have been made upon said water works subsequent to the passage of the act of 1879.

The said Fisher, not being a party to the contract between the receiver and the municipal authorities of the City of Greensboro, is advised by counsel that it is not incumbent upon him to participate in said transactions, otherwise than to inform this Honorable Court of the nature and character of his said judgment, and his rights thereunder and incident thereto.

This the 27th day of September, 1901.

Respectfully submitted."

COMPLAINT OF B. S. FISHER.

(16) "B. *S.* Fisher
against
Greensboro Water Supply Company.

The plaintiff complains of the defendant, and alleges:

I. That the defendant company is a corporation duly organized under the laws of the State of North Carolina, and as such is engaged in supplying water to the City of Greensboro and its inhabitants for the purposes of domestic use, and also for use in case of fire, and as such are the owners and possessed of all the rights, privileges, powers and franchises necessary and incident to the operation and conduct of the business in which it is engaged.

II. That by virtue of a deed executed to the defendant company by Hugh L. Pope, on the 31st day of May, 1896, as will appear by reference to Book 104, page 656, etc., in the office of the Register of Deeds of the county of Guilford (to which reference is made, and so much thereof as is applicable to this case is hereby prayed to be taken as a part of this complaint), the said defendant company became the purchasers, and possessed of all the rights, titles and interests (in law or in equity), powers, franchises, earnings and revenues theretofore owned or acquired by the Greensboro Water Company, or exercised and acquired by James D. Glenn, receiver, in a certain suit in the United States Circuit Court, at Greensboro, wherein one Middendorf and others were the plaintiffs and the Greensboro Water Company was the defendant, including all the property, real, personal and mixed, and all the rights and interest in law and equity, privileges, powers, franchises, earnings and revenues belonging to, or acquired by the said Greensboro Water Company, or exercised and acquired by the said James D. Glenn, receiver, as aforesaid, under and by virtue of the laws and acts of the Assembly of the State of North Carolina, and under and by virtue of the acts, concessions and permissions of the corporation of the City of Greensboro, or its Board of Aldermen or other officers or representatives, either of the city (17) or of the county of Guilford, or by virtue of any act, contract, grant or license of any corporation or person whatsoever, or the decrees of the said court, together with all the real estate, personalty, rights-of-way, or other easements or property or any sort or description whatsoever, in the State of North Carolina, or wheresoever situated, of the said Greensboro Water Company, or the said receiver, including particularly all the water works, dams, reservoirs, tanks, pumps, basins, pipes, mains, hydrants, fire plugs, owned or acquired by the said Greensboro Water Company or the said receiver, and all the machinery, engines, tools, implements and materials for constructing, operating or repairing said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money and income arising, or to arise, from the operation of the said water works under the franchises granted or belonging to the said Greensboro Water Company.

III. That under the contract entered into between the City of Greensboro, a municipal corporation, acting in accordance with law, and by virtue of its charter, a contract or ordinance was made in pursuance thereof, and in accordance with law, whereby W. W. Taylor and others were authorized to construct and maintain and operate water works and supply the City of Greensboro and its inhabitants with water, etc. That under

said contract the said Taylor and others were empowered to build, construct, maintain, own and operate water works in the City of Greensboro, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use; to lay down pipes and water mains for the purpose of conveying water through the streets, avenues and alleys of the city, then existing or thereafter to be laid out or opened up, for the purpose of conducting and distributing water throughout said city; to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump-houses and other appliances and attachments necessary for the proper constructing and carrying on of said water works, etc., so as to secure the most adequate supply of water for all domestic use, and the greatest protection against fire, for the term of twenty (20) years from the date thereof, to-wit: the —— day of ———, 1887.

(2) It was further contracted and agreed that the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works should be ample and sufficient for the purposes mentioned in the said contract. (18) That it was further agreed that said water works, to-wit: its pump-house or other suitable house in connection therewith, should at all times be occupied by an engineer, or some suitable and intelligent employee, who should at all hours be accessible to the call of the city for water; and in order to facilitate a sufficient supply of water in case of urgency or peril, it was further agreed that the said pump-house, or other suitable house, should be connected with the fire department of the city, or other place designated by the city, by a telephone, electrical apparatus, or any like suitable appliance, by which alarms, calls, and communications might be had at all hours with the engineer or employe at said pumping-house or dwelling, as aforesaid, so as to make communication of threatened danger or want of water at all times as speedy and as sure as possible. And that the said Taylor and others should keep a suitable, intelligent and efficient employe always at a place where he could be accessible to the alarms, calls and communications above named, and whose duty it was to respond promptly to such alarms, calls and communications.

(3) That the engines and machinery should be adequate and adapted to the requirements of said contract, and the machinery and appurtenances should be sufficient to give a capacity of one and one-half millions (1,500,000) gallons of water in twenty-four (24) hours against a pressure of two hundred (200) feet head.

(4) That the storage water tank, from which the supply of water comes immediately should be, at its top water level, one hundred (100) feet above the surface of the ground at the center of the public square near the court-house, and should be of a capacity to hold at least one hundred thousand (100,000) gallons of water, and should be filled to its top every day, an hour before sundown.

(5) That for the extinguishment of fires pumping engines should be kept ready at all times to supply the needed fire pressure.

(6) That the City of Greensboro should pay for the seventy-five (75) hydrants named in the said contract the sum of two thousand, eight hundred and seventy-five dollars ($2,875), payable semi-annually on the 1st day of July and on the 1st day of January of each year, the first payment of the fraction to be payable the 1st day of July, 1888.

IV. That the said W. W. Taylor and others, on the 29th (19) day of December, 1887, were incorporated under the general laws of North Carolina by the name and style of the Greensboro Water Company, whereby they were empowered to build and construct water works and to own and operate the same for the purpose of supplying the city of Greensboro and the inhabitants thereof with pure and wholesome water for domestic and sanitary purposes, for manufacturing and for protection against fire; which articles of incorporation are recorded in the office of the Clerk of the Superior Court of the county of Guilford in "Record of Incorporations," pages 38 and 39, to which reference is hereby made; which said articles of incorporation, filed as aforesaid, together with all the privileges and powers therein granted, was ratified by the General Assembly of North Carolina on the 3d day of March, 1891, as will appear by reference to chapter 166 Private Laws of North Carolina, pages 1009 and 1010, which said act likewise conferred upon the company power to borrow money and to secure same by mortgage.

V. That the contract, as aforesaid, made with the said W. W. Taylor and others, was assigned and transferred to and assumed by the said Greensboro Water Company, which said company acquired all the rights, privileges and powers therein granted and conferred to the said Taylor and others, and undertook to carry out the provisions thereof by constructing water works, pump-houses, engines, or tanks, towers, mains, pipes, hydrants, etc., for the purpose of supplying the inhabitants of

the City of Greensboro with water under the said contract, and likewise for the purpose of supplying a sufficient quantity of water for the extinguishment of fire. That under the said contract the said water works company collected under said contract from the City of Greensboro an annual rental of two thousand, eight hundred and seventy-five dollars ($2,875), up to and until the 4th day of June, 1892, when the said company went into the hands of a receiver, by virtue of a decree of the Circuit Court of the United States in the said case of Middendorf and others against the Greensboro Water Company, which said two thousand, eight hundred and seventy-five dollars ($2,875) was, by an agreement made with the said water company, paid to Baltimore Trust and Guarantee Company, of the City of Baltimore, to be applied to the payment of interest on mortgage bonds issued by the said Greensboro Water Company. Said amount was paid by the said City of Greensboro, on account of the said water company, up to the time of the appointment of said Glenn as receiver, and thereafter annually paid to him during the ope-
(20) ration of the works by him as said receiver, the same being raised by taxation for the necessary and incidental expenses of the city, laid upon the inhabitants thereof, and collected as other taxes are collected, for the use of the government of said city.

VI. That the plaintiff in this action is an inhabitant and a taxpayer, both upon real and personal property, in the City of Greensboro, and was assessed his proportionate part of taxes according to the property owned by him, and he paid the same to the City of Greensboro as a part of the said two thousand, eight hundred and seventy-five dollars ($2,875), as a rental for the water to be furnished by the said water company to the said City of Greensboro and its inhabitants under the said contract.

VII. That, by virtue of his said appointment as receiver, the said James D. Glenn undertook to carry out the contracts and agreements of the said Greensboro Water Company, among which was the above mentioned contract of Taylor and others with the said city, which had been assumed by the Greensboro Water Company, and, during the time he was receiver, additional mains and pipes were laid, and hydrants constructed, and other improvements put upon the works, for which an additional amount was paid by the City of Greensboro to the said receiver under the terms of the said contract.

VIII. That, by virtue of a decree of the Circuit Court of the United States in the said suit of Middendorf et al., the property of the Greensboro Water Company was sold as aforesaid

by Commissioners Archibald H. Taylor and Robert R. King, on the 30th day of April, 1896, at which sale the said Hugh L. Pope became the purchaser, to whom was conveyed all the rights, titles, privileges, franchises, property, real, mixed and personal, including all the contracts assumed by the said Greensboro Water Company, and the said Glenn, receiver, including all tanks, dams, reservoirs, pumps, basins, pipes, mains, hydrants and fire plugs owned or acquired by the said Greensboro Water Company or the said receiver, and all the machinery, engines, tools, implements and materials for constructing, operating and repairing said water works, or any part thereof, and all revenues, rates, rentals, tolls, sums of money and income arising, or to arise, in the operation of the said water works under the franchise granted or belonging to the said Greensboro Water Company, which said deed of conveyance is referred to and made a part of the deed made by the said Pope to the defendant (21) in this action, the Greensboro Water Supply Company, to which reference is hereby made, the same being recorded on page 652, Book 104, Register's office of the county of Guilford.

IX. That the said defendant company, by virtue of the said deed of conveyance, as aforesaid, took possession of the said property of the Greensboro Water Company, then in the hands of the said receiver, and all other property and effects belonging to it, and has been, from the time of said purchase and up to and including the time hereinafter mentioned, so conducting, managing and operating said water works, and have been laying pipes and water mains for the purpose of conveying water through the streets, avenues, and alleys of the city, and have been distributing water throughout said city, and have been receiving rentals and incomes from the said City of Greensboro, and the inhabitants thereof, for the use of the water supplied by it, and have assumed all the obligations and duties imposed upon it, and have enjoyed all the privileges and benefits derived from the said contract, hereinbefore referred to, a copy of which contract, made with the said Taylor and others, as aforesaid, which contract is hereto attached, marked Exhibit "A," and so far as is applicable is hereby made a part of this complaint.

X. That when the said defendant company took possession of the said water works, it took it with the agreement and understanding between it and the said City of Greensboro, that it would keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred (100) feet of hose and a one-inch ring and nozzle, and that they would constantly,

day and night, keep all the said hydrants in good order and supplied with water for fire purposes.

XI. That on the morning of the 17th day of June, 1899, about the hour of noon, the Benbow house, a four-story hotel, situate on the corner of South Elm and Sycamore streets, in the City of Greensboro, accidentally and without any fault on the part of the plaintiff, the owner and proprietor of said hotel, caught on fire at the southwest corner of the building on Sycamore street, just over the building known as the kitchen, near or in the mansard roof of the building. That immediately after the fire was discovered an alarm was sounded, and in the space of a short time, or as soon thereafter as it was practicable, the fire department of the City of Greensboro responded to said alarm, (22) and immediately came to the said Benbow hotel, having with them their hose, their engine, aeriel ladders and all other necessary appurtenances for the immediate and ready extinguishment of the fire. That upon arriving at the scene of the fire, within ten (10) minutes after the alarm had been sounded, the hose had been attached to the hydrants of the defendant company in and about and near the said hotel, and the water turned on. The seat of the fire being the immediate objective point of the fire company, a stream of water was undertaken to be thrown from an aeriel ladder, which had been raised immediately under the fire on Sycamore street, when the water pressure was not sufficient to throw a stream higher than between the second and third-story windows, a distance not exceeding thirty (30) feet, falling short of the fire some twenty (20) feet or more. That almost immediately thereafter the aeriel ladder was raised to the top of the roof above the kitchen and on the building, and the water pressure was not sufficient to throw a stream of water with any force whatever from the nozzle, but the water simply oozed from the nozzle, without any force whatever.

XII. That immediately after the fire began, when it was almost in an insignificant state, the employees of the hotel undertook to use the hotel hose, which was connected with the water main within the building, but owing to the lack of pressure of water, the said hotel employes and others attempting to extinguish the fire could not reach the fire with the water, notwithstanding the nozzle of the hose was within eight (8) or ten (10) feet from the seat of the fire.

XIII. That at any time within thirty (30) minutes after the fire had been discovered, if there had been sufficient pressure of water to play upon the building and fire, either by the com-

pany hose, which was attached to the hydrant on the outside of the hotel, or from the hotel hose in the hotel, the fire could have been speedily and easily extinguished with but very little damage to the property and building. That not for more than one hour after the fire had begun, and not before it had gained such headway as to consume a greater portion of the building, and do great damage, was the pressure of water sufficiently strong to throw a stream as high as thirty (30) feet, falling short of the seat of the fire in almost every attempt to reach it; and even after the hose was carried to the roof of the house by the firemen and an attempt was made to use the water from the top of the building, the pressure was not sufficient to give any effective force to the water, whereby the fire could be even re-
(23) tarded, much less subsided. That a number of hose were attempted to be used on the east side of the hotel on South Elm street, as well as on Sycamore street, but not until after the fire had gained such headway as to have produced great damage and destruction of the property was there a sufficient pressure of water supplied by the defendant company to reach the fire, or to be of any practical benefit in its extinguishment.

XIV. That the fire department of the City of Greensboro was in every respect fully equipped, capable and efficient to cope with said fire, and if supplied with a sufficient pressure of water, whereby a stream of water could have reached the fire, which was less than a vertical height of one hundred (100) feet in still air, it could, with little difficulty, have extinguished the same; in fact, had the water pressure been sufficient to have forced the water out of the hose attached inside of the hotel, known as the hotel hose, the fire could have been extinguished within from three (3) to ten (10) minutes after it had been discovered.

XV. The plaintiff alleges that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the City of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the City of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city, and derived by said city from taxation on the inhabitants thereof, and particularly on the plaintiff, a property owner, as aforesaid, and a tax payer in the said City of Greensboro, and by reason of the said wilful, tortious, culpable, reckless and gross negligence of the said defendant company, and by reason of its failure and omission to perform its contractual, as well as its public obligations and duties to the said City of Greensboro and its inhabi-

tants, and especially toward the plaintiff in this action, in that it wholly failed and carelessly and negligently refused to furnish the said hydrants in and about the said hotel, as hereinbefore set forth, with a sufficient pressure of water to extinguish the said fire before the same had greatly damaged and effectually destroyed and injured a greater part of the said building, and by reason of such tortious, negligent and careless conduct on the part of the said defendant company the plaintiff was damaged in the sum of forty thousand dollars ($40,000.00).

XVI. The plaintiff is advised, and so alleges, that the de-
(24) fendant company negligently failed to perform its obligations to the said City of Greensboro and its inhabitants and tax-payers, and especially toward the plaintiff in this action, by carelessly, wilfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said City of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied.

XVII. The plaintiff alleges that the defendant company negligently and carelessly failed to keep its pumping engine ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned.

XVIII. That there was sufficient hydrants in and near said hotel property to amply furnish a sufficient quantity of water to have extinguished the said fire if there had been a sufficient pressure upon the same, whereby the water could have been utilized by the fire department, but by reason of the lack of pressure the said fire department, as hereinbefore stated, was wholly unable to arrest the flames in their ravages of the building and property of the plaintiff, but stood helpless and impotent to extinguish the said fire and save the said property of the plaintiff from the great damage and destruction which thereby ensued.

XIX. That the omissions and failure of the said defendant company to perform its duty and obligations, as hereinbefore set out, and its gross negligence in failing to supply a sufficient water pressure to meet the exigencies and necessities of the occasion, which was its bounded duty to do, both under the contract as hereinbefore stated, as well as the benefits derived

and enjoyed by it by the license and privileges granted to it by the said City of Greensboro and its inhabitants, the property of the plaintiff was almost wholly destroyed, greatly to his damage, in the sum of forty thousand dollars ($40,000.00).

XX. That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the of the destruction of his property, whereby the defendant company becomes liable therefor.

Wherefore the plaintiff demands judgment against the defendant, The Greensboro Water Supply Company, for the sum of forty thousand dollars, damages and the costs of this action, and for such other and further relief as in law or equity he may be entitled."

JUDGMENT ON FISHER COMPLAINT.

(25) "This cause coming on to be heard and being heard before His Honor Judge Timberlake and a jury, at the January Special Term of Guilford Superior Court, 1901, the following issues were submitted to the jury, and were by them answered as hereinafter appears, viz.:

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the City of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, set out and described in the complaint, in the quantity and for the purposes set out? Answer. 'Yes.'

2. At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. 'Yes.'

3. Did the defendant company fail to comply with its contract? Answer. 'Yes.'

4. Was the plaintiff injured by the negligence of the defendant? Answer. 'Yes.'

5. What damage, if any, has the plaintiff sustained? Answer. '$25,000.00.'

It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff, B. J. Fisher, recover of the defendant, the Greensboro Water Supply Company, the sum of twenty-five thousand dollars ($25,000) damage, and for the costs of this action to be taxed by the clerk."

ORDINANCE OF THE CITY OF GREENSBORO.

(26) "An ordinance authorizing W. W. Taylor, of Philadelphia; Charles S. Hinchman, of Philadelphia, and Fred B. Hubbell, of Baltimore, to construct and maintain and operate water works to supply the City of Greensboro, North Carolina, and its inhabitants with water, and defining their rights, duties, privileges and powers.

Section 1. That the said Charles S. Hinchman, W. W. Taylor and Fred B. Hubbell be, and they are hereby, empowered to build, construct, maintain, own and operate water works in the City of Greensboro, North Carolina, to supply said city and its inhabitants with pure, good, wholesome water, suitable for all domestic, sanitary and fire purposes, and for individual use, to lay down pipes and water mains for the purpose of conveying water through the streets, avenues, and alleys of said city, subject to the conditions hereinafter named, to use within the present and future limits of said city any and all streets, avenues, alleys and bridges, and such other public grounds as are now or may be hereafter laid out while constructing or repairing such water works, to receive, take, store and purify water, and conduct and distribute it through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses and other appliances and attachments nec-
(27) essary or expedient for the proper conducting and carrying on said water works, to cross any street in said city, in laying or extending their pipes, conduits or aqueducts as may be necessary and proper for the distribution of water throughout said city, so as to afford the most adequate supply for all domestic uses and the greatest protection against fire.

Provided, however, that the said grantees aforesaid shall not permanently use any street, avenue, alley, bridge or public grounds above named or occupy the same for any longer time than necessary for the purpose hereinafter indicated, without the permission of the Board of Commissioners, first obtained.

Nor shall the aforesaid grantees permanently injure any street, avenue, alley, bridge or other public grounds above named, but shall restore them to the like condition as it found said streets, avenues, alleys, bridges and public grounds aforesaid, saving the necessary and proper underground work Pro-

vided also that the supply of water hereinbefore named shall continue sufficient for all domestic, sanitary and fire purpose and individual use.

Said grantees are to have the exclusive right to construct, maintain and operate said water works as hereinafter specified, and on the conditions, terms and liabilities set out in this ordinance for the term of twenty years from the date of the completion and acceptance of said water works, and unless such rights shall sooner be terminated as hereinafter provided by purchase or forfeiture, all such rights and liabilities shall continue for another like period of twenty years, unless said additional term of twenty years be also ended as above provided by purchase or forfeiture.

Sec. 2. The plant of the machinery, engines, fixtures and other necessary appliances and appurtenances belonging to said water works shall be amply sufficient to supply water for the purposes hereinafter mentioned to at least twenty thousand people and to be enlarged and extended to supply a greater actual population, if so required by the Board of Commissioners of the city for the necessities of its inhabitants.

Sec. 3. In case there shall be any disagreement or controversies between the City of Greensboro and the grantees aforesaid in rgard to the supply of water or the quality of and quantity thereof or the manner of supplying the same, either party shall have a right to demand in writing of the other, that such manner of dispute, disagreement or controversy be submitted to arbitration, one arbitrator to be chosen by each party, who (28) are to be non-residents of the City of Greensboro and impartial and disinterested persons, and if they disagree they shall have power to call in an umpire, and the award of the two arbitrators, or one arbitrator and the umpire, filed in writing with the parties and signed by them, shall be final and binding upon both parties, and either party shall have the right to have the same specifically performed in a court of equity or other appropriate judicial tribunal and a failure to perform such award in a reasonable time by the aforesaid grantees shall work a forfeiture of its rights under the ordinance.

Provided that if the dispute or controversy be in regard to the quality of the water, the arbitrators and umpire shall be chemists of good reputation.

Sec. 4. The machinery, pipes, hydrants, valves, pumping plant and all other like appurtenances and fixtures used in the water works and in supplying the water are to be first-class in their material and the manufacture thereof.

The grantees aforesaid guarantee and stipulate that the water supplied shall be pure and wholesome, and that the supply shall be, and continue adequate to the demand for the same by the city or its inhabitants.

Sec. 5. During the progress of the work the grantees aforesaid shall not unnecessarily obstruct any street, avenue, alley or public ground in laying its pipes or conduits. They will properly repair and make good any gas or sewer pipes, previously laid, which shall be disturbed, misplaced, or injured by it, and complete each part of work commenced as speedily as possible and restore all the ground disturbed, to as good condition as it was before the work began, and that in the erection, construction and repair of said work in any street, avenue, alley, bridge or other public grounds aforesaid, and removing pavements, curbstones or sidewalks or other public grounds, and making all necessary excavations for repairs. The grantee aforesaid shall suitably guard and protect the same by enclosures, lamps, watchmen or by the use of any other precaution necessary to prevent injury to persons and property by reason thereof, and said grantees aforesaid shall be liable for all damages for failure to so guard and protect persons and property from injury, when occasioned by its negligence and shall save the city harmless therefrom.

Sec. 6. The water works shall be complete in all its details. The pump house erected shall be of brick, covered with metal and of substantial and neat architecture and, as far as possible, protected from fire. There shall also be in connection (29) with said pump house, near by or as a part thereof, an engineer's dwelling house to be occupied by the engineer or some suitable, intelligent and efficient employee of the grantees who shall, at all hours, be accessible to the call from the city for water.

That these houses, or such one as may be suitable and necessary, may be connected at the expense of the city with the fire department of the city, or other places designated by the city, by telephone, electrical apparatus or any like suitable appliances, by which alarms, calls and communications may be had at all hours with the engineer or employees at said pump houses or dwelling houses aforesaid, and so as to make the communication of threatened danger or want of water or other demand as speedy and as sure as possible.

And the grantees are to keep a suitable, intelligent and efficient employee always at a post where he shall be accessible to the alarms, calls and communications, above named, and shall respond promptly to such alarms, calls and communications.

Sec. 7. The engines and machinery shall be in duplicate and in the beginning, fully adequate and adapted to the ultimate requirements and stipulations of this ordinance and contract.

The machinery and appurtenances shall be sufficient to give a capacity of one and a half millions of gallons (1,500,000) in twenty-four hours against a pressure of two hundred (200) feet head.

The storage water tank from which the supply of water comes immediately shall be at its top water level one hundred feet (100) above the surface of the ground at the center of the public square near the court house and shall be large enough to hold at least one hundred thousand (100,000) gallons of water, and it shall be filled by the grantees aforesaid to its top every day an hour before sun down.

Sec. 8. For the extinguishment of fires the pumping engine shall be kept ready at all times to supply the needed fire pressure.

Sec. 9. The grantees aforesaid shall submit their water works, when finished, to the following as a test of its capacity and efficiency: They agree that the works shall throw six (6) streams of water from six (6) hydrants to a vertical height of one hundred (100) feet in still air, each stream being taken from one hydrant with one hundred feet (100) of hose and a one-inch ring nozzle.

Sec. 10. All the water mains and pipes used by the grantees (30) aforesaid shall be of the best quality, coated inside and outside with Dr. Angus Smith's patent coal tar varnish, and shall be tested at their place of manufacture to withstand a hydrostatic pressure of three hundred pounds to the square inch.

The distribution of pipes and the location of hydrants shall be as indicated in a map to be furnished by the city subject to be changed at any time by the city at its own expense. The pipes shall be laid and properly embedded in the ground of sufficient depth to prevent freezing. Not in any case to be less than two (2) feet from the surface.

The grantees aforesaid agree to extend the pipes whenever required so to do by the Board of Commissioners on condition that there shall be placed on said extension of piping twelve hydrants to the mile, for the rental of which the city will pay thirty-five dollars ($35.00) each, and which price shall be the rental of all hydrants over seventy-five.

Sec. 11. The grantees aforesaid agree to furnish a better hydrant than the Matthews double opening fire hydrant and to use the Eddy valve.

If the hydrants put in by the grantees shall be unsatisfactory in its operations to the city of Greensboro, it may require the grantees aforesaid to submit the matter to arbitrators as hereinbefore provided, and the grantees agree, if the arbitrators so award, to change the hydrants to the one designated by the arbitrators.

All the hydrants shall be made to fit on any particular hose coupling which shall be indicated in writing, by the City of Greensboro. The indication in writing to be furnished in twenty days from the execution of this contract.

Sec. 12. The city agrees to use the hydrants for the extinguishment of fire only, subject to exceptions hereinafter named, to-wit:

(1) The grantees aforesaid agree to furnish water to the city from the hydrants for street sprinkling, flushing gutters and sewers, fire drill and all other public city uses and purposes (not specified in the schedule of prices and free supplies) at the rate of two-fifths of a cent per barrel or ten (10) cents per one thousand (1,000) gallons.

The grantees aforesaid agree that they will furnish the following supplies free of charge, to-wit:

(1) One telegraph faucet in each of the two public schools.

(2) One fountain in the central portion of the city for the personal use of passers-by, horses from the country and those in (31) draft here, but not to be used by horses led indiscriminately from stables in the city to be watered at this fountain. Nor is water to be carried from the fountain for the use of citizens or others, nor of stock except as above provided.

Sec. 13. The size of the piping shall be as follows, to-wit:

From the pumping station to the south end of South Elm st.,	10 inches.
From this ten-inch pipe on South Elm street to the storage tank,	12 inches.
Along West Market from Elm to Edgeworth street,	8 inches.
Edgeworth street to Cedar street,	6 inches.
Cedar street to College,	6 inches.
Elm street to Forbis street,	8 inches.
Forbis street to Gilmer street,	4 inches.
On Cedar street,	4 inches.

On Spring street,	4 inches.
On Edgeworth street,	6 inches.
On Eugene street,	4 inches.
On Ashe street,	4 inches.
On Green street,	4 inches.
On Davie street from Market to N. C. R. R.,	6 inches.
On Davie South of N. C. R. R.,	4 inches.
On Forbis street,	4 inches.
On Percy street,	4 inches.
On Gaston street,	4 inches.
On Sycamore street,	4 inches.
On East Washington street to Forbis street,	4 inches.
On West Washington street,	4 inches.
On New street,	4 inches.
On Asheboro street,	8 inches.
On Depot street,	6 inches.
On Church street,	6 inches.
On Lindsay street,	4 inches.

It is the further agreement and understanding of the parties to this contract that if at any time hereafter it shall appear to the city that the foregoing sizes of piping are inadequate to the supplies needed in those localities that the City of Greensboro shall have the right to indicate its opinion in writing to the grantees aforesaid and request an arbitration to settle the matter. It shall then be the duty of said city and grantees aforesaid to appoint arbitrators as hereinbefore provided, and if they award that the piping shall be increased, it shall be the duty of (32) the grantees aforesaid to change the piping according to the award, and to begin such work within twenty (20) days after the award in writing is furnished to said grantees.

Sec. 14. The grantees aforesaid shall furnish supplies of water to the Greensboro Female College and Bennett Seminary, if desired by them, at the same rates and prices and on the same conditions, terms and regulations as it furnishes supplies to the City of Greensboro and its inhabitants.

Sec. 15. If the hydrants get out of order it shall be the duty of the grantees aforesaid to use all the diligence to repair the same and shall forfeit two dollars ($2.00) per day to the City of Greensboro for every day that it fails to perform said duty.

Sec. 16. The grantees aforesaid shall have the right to make all reasonable and just rules and regulations governing the service of water to private consumers as may be necessary for

their protection in that behalf and may enforce the observance of the same by cutting off the supply of water or otherwise, and shall have the right at all reasonable hours of the day to have access to the water pipes and metres of any taker; to protect itself from abuse and fraud, or repair or observe or remove the same, and may require all water takers to sign a contract embracing these rules and regulations.

The City of Greensboro shall protect the works and property of the grantees aforesaid in said city by suitable ordinances.

Sec. 17. The grantees aforesaid shall furnish the City of Greensboro a description and draft of its machinery, appurtenances, fixtures, location and size of piping, hydrants, storage tank, pump houses and other houses and other like information desired by the city to give the Board of Commissioners an intelligent and comprehensive idea of the extent, kind and condition of its whole water works and its connections.

Sec. 18. The grantees aforesaid shall put in gate valves in sufficient numbers to divert and control the water and have as few dead ends as possible.

Sec. 19. The said grantees aforesaid shall constantly, day and night, except from unavoidable accident, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said services, and shall maintain a head of at least seventy (70) feet in the stand pipe or storage tower, except in case of unavoidable accident or when the water is drawn off to cleanse the tank.

(33) Sec. 20. The grantees aforesaid shall furnish water supplies to the city and its inhabitants at the following maximum prices, to-wit:

Tariff of charges per annum, payable semi-annually in advance:

Banks, churches, stores, &c.	$ 5 00
Bakeries (not less than $10.00 daily average one barrel flour each	4 00
Barbers, each chair	3 00
Baths, private (hot water) each $1.00 extra.	3 00
Baths, public, each (includes hotels and boarding houses)	10 00
Smith shops, per fire	2 50
Building, brick per M., stone, per porch, 5 cents; plastering per square yard, ½ cent	
Hotel, per room	1 20

Boarding house, room rates (no charge less than $10.00), extra for each boarder, 50 cents	
Laundries and washer-women	$8 00 to 20 00
Printing offices—weekly—hands or less (each additional hand, 50 cents)	8 00
Photo. gallery	$10 00 to 15 00
Residence, for general domestic use—4 rooms or less	5 00
Residence, for general domestic use—6 rooms or less	6 00
Residence, for general domestic use—8 rooms or less	7 00
Residence, for general domestic use—10 rooms or less	9 00
Residence, for general domestic use—12 rooms or less	10 00
Residence, for general domestic use—more than 12 rooms	11 00
Restaurants	$8 00 to 15 00
Private stable—horse and carriage, each	1 50
Public stables—horse and carriage, each	2 00
Steam boiler, per horse power, up to 15, special	
Saloons, beer, &c.	10 00
Pavement washer, including street sprinkler ½ width of street, per each 25 feet front (each add. 25 feet or fraction 2.00)	3 00
Irrifigation—lawns, gardens, &c., per 1,000 sq. ft. or fraction	1 50
((34) Meter measurement (no charge less than $10.00; per 1,000 gallons, 25 cents; factories, fountains, school, &c., special rates.	

And consumer shall have the right to put in a meter and pay for water at the meter rates. The grantees aforesaid shall also have the privilege of putting in a water meter and charging for the water at meter rates.

The water rents charged by said grantees to consumers for domestic and manufacturing purposes shall not exceed the average rates charged in other towns in this State supplied by a like system. The connection between the main and the consumer shall be made at the expense of the consumer and the lowest annual rate for any one consumer shall be five dollars, $5.00.

Sec. 21. The grantees aforesaid shall begin active operations in good faith on the water works in thirty days from the

time this ordinance is passed and accepted by the grantees aforesaid, and the grantees aforesaid shall have the said works completely finished by the 30th day of April, 1888, ready for tests hereinbefore provided for and for the acceptance of the City of Greensboro.

Sec. 22. The grantees aforesaid shall not employ convict labor on the works, and shall, as far as practicable, employ labor from this vicinity.

Sec. 23. The City of Greensboro shall pay for the rental of the seventy-five hydrants, hereinbefore provided for, the sum of two thousand, eight hundred and seventy-five dollars ($2,875.00), payable semi-annually, the first day of July and the 1st day of January, of each year. The first payment of the fraction to be payable the 1st day of July, 1888.

Sec. 24. At the expiration of ten years from the passage of this ordinance, and at each recurring ten years thereafter, the City of Greensboro shall have the right to purchase the said water works of said grantees at such price or on such terms as may be agreed upon; but in case the parties cannot agree as to the price and terms, the city may give three months notice to the grantees aforesaid of its desire to purchase said water works, and it shall then be the duty of each party to appoint a disinterested arbitrator, not a resident of Greensboro, and these two, if they disagree as to the price and terms of the purchase, shall call in an umpire chosen by them and the award of a majority of the three, or of the two arbitrators, shall be final and binding on the parties, and if the grantees aforesaid refuse to abide by the award, they shall forfeit all their rights under this ordinance as a contract.

The award of the arbitrators shall be in writing, and furnished to each of the parties. The city shall have the option, within ten days after the award is made, to accept or reject the purchase at the price and on the terms awarded by the arbitrators.

If the city declines to purchase, it shall pay the expense of the arbitartors, otherwise to be divided between the parties.

Sec. 25. The city shall be responsible to the grantees aforesaid for any injury negligently done to the hydrants by any of its employees.

Sec. 26. Whenever the words "Grantees aforesaid" are used, they stand for the parties to whom this franchise is granted."

STATUTE OF NORTH CAROLINA, BEING SECTION 1255 OF THE
(35) CODE OF THAT STATE.

"Mortgages of incorporate companies, upon their properties or earnings, whether in bonds or otherwise, hereafter issued, shall not have the power to exempt the property or earnings of such incorporation, from the execution for the satisfaction of any judgments obtained in the courts of the State, against such incorporation * * * for torts committeed by such incorporation, its agents or employes, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

ANSWER OF THE GUARANTEE AND SAFE DEPOSIT COMPANY OF PHILADELPHIA.

(36) "The answer of the Guarantee Trust and Safe Deposit Company of Philadelphia to the original bill of complaint and to the amended bill of complaint of the Guardian Trust and Deposit Company, complainant in these proceedings, respectfully shows unto your Honors:

That by way of answer to the said bill of complaint and the amendment thereto of the said Guardian Trust and Deposit Company in these proceedings filed, this respondent now, and at all times hereafter, saving to itself all manner of benefit or advantage of exception or objection that can or may be had or taken to any errors, uncertainties or imperfections in said original bill of complaint or amended bill contained, for answer thereto, or to so much thereof as this respondent is advised it is material and necessary for it to make answer to, answering, says:

First. That this respondent admits the first paragraph of the original bill of complaint and of the amended bill of complaint, and also admits the allegations of the paragraphs 2 to 7, inclusive, of the original bill of complaint, with the exception of paragraph 5 B of the said original bill of complaint, which it expressly denies, and it also admits the allegations from 2 to 6, inclusive, of the amended bill of complaint, and denies the allegations from 7 to 9, inclusive, of the said amended bill of complaint, and, further answering, this respondent says that it is a corporation duly and originally created and organized by and under the laws of the State of Pennsylvania, having its principal office and place of abode in the City of Philadelphia, within said State, and is a citizen of the State of Pennsylvania, and that the other parties to these proceedings against whom the answer and defense of this petitioner and respondent

for its interest in the premises is hereby asserted, namely: the Greensboro Water Supply Company, the defendant, and Helen G. Brown, A. M. Scales, assignee of Hodgin, Pegram and Company; A. M. Scales, assignee of A. A. Hinkle, the Southern Stock Mutual Insurance Company, and B. J. Fisher, claimants, are citizens of the State of North Carolina, and the complainant in these proceedings mentioned, the Guardian Trust and Deposit Company, is a corporation duly incorporated under the laws of the State of Maryland, and a citizen of said State, and the subject matter, claim or thing in dispute in this suit, claimed by your said petitioner, or respondent against all of the said other parties above mentioned, is of a value exceeding two thousand dollars ($2,000.00).

Second. And, further answering, this respondent says that, as set out in the third paragraph of said original bill of complaint, the said defendant, the Greensboro Water Supply Company, never received any title to the property in these proceedings mentioned, except subject to the operation and effect of the mortgage in these proceedings mentioned, from the Greensboro Water Company to this respondent, dated January 10th, 1888, and duly filed for registration and recorded in the office of the Register of Deeds of Guilford County, North Carolina, in Book —, No .—, pages No. —, *et seq.*, and known in these proceedings as 'Complainants' Exhibit C,' and subject to the operation of which mortgage it made its conveyances to said complainant as set out in said bill of complaint; and your respondent further particularly admits and alleges that the statements and admissions of the said bill of complaint and said amendment thereto, (37) to the effect that the said deed of trust made by the said Greensboro Water Company to your respondent, was, and is, a first lien upon the property in these proceedings mentioned, and upon the purchase money and proceeds of sale of said property now paid into court, are true, as hereinafter more particularly and fully set out, and this respondent refers to and adopts the findings of the master and auditor of this court, Clement Manly, Esquire, in support of the allegations of this answer.

Third. And, further answering the said bill of complaint, and the said amended bill of complaint, this respondent avers that, by the terms of the mortgage to it by the Greensboro Water Company, a body corporate, dated January 10th, 1888, and hereinbefore described as 'Exhibit C,' the said property of the Greensboro Water Company, being the property in these proceedings mentioned, and heretofore sold by the order of this court, was conveyed to your respondent in trust to secure the payment according to the terms thereof, of fifty first mortgage

bonds, each of the denomination of one thousand dollars ($1,000), and particularly mentioned and described in said mortgage; that said first mortgage bonds of the Greensboro Water Company were duly issued, sold and negotiated by the said Greensboro Water Company for value, about the date of the same, and are now all outstanding having been purchased for value in the hands of the holders thereof, as appears by the testimony heretofore taken by said auditor and master of this court, and by the findings of fact heretofore made and reported by him; that the said bonds are not overdue or in default according to the terms thereof, and that the interest upon the same has been regularly paid according to the terms of the coupons, until the date of the last coupon falling due August 1st, 1901, the money to pay which interest, however, was fully earned by the property operated by the receiver in this cause, as appears from his accounts and report heretofore made to the court in these proceedings, and now ready to be made and reported, but that the said receiver has withheld payment of the said coupons until the further order and direction of this court; that the said bonds are not, therefore, in default as to the principal or interest thereof, nor have the holders thereof or your respondent, as their trustee, ever claimed any default or asked or invoked the aid of a court of equity to declare the same, or to execute any remedy for such default under the terms of the deed of trust, but that the holders of a large majority of said bonds, and, in fact, the holders of all that have been communicated with, (38) have expressed their willingness to receive the principal of said bonds, with interest accrued to date of such payment, and to surrender their said bonds to be cancelled by order of the court in order to enable the said City of Greensboro, the purchaser in these proceedings mentioned, to receive a full and complete title to the property, so as aforesaid ordered to be sold to said city by this court, and the other parties to the cause to obtain an immediate distribution of the said fund in court, subject to the lawful rights and priorities of the said respondent, the trustee for the bondholders under the said deed of trust, to have and receive payment in full of the value of its liens for the principal amount and the interest of the said issue of bonds secured by said deed of trust; that your said respondent specially calls the attention of the court to the fact that, under the terms of the said bonds and the said deed of trust, the said bondholders are the owners of an investment far exceeding in value the said principal sum and interest accrued to date set out in said bonds, but are entitled of right to hold and enjoy the said bonds and their investment in the same until the full period of maturity of their said bonds, and that their said investment cannot be replaced by the amount of money which they are thus asked to receive,

in order to enable the purchaser and the other parties in these proceedings mentioned, to obtain what is asked by them of this court, but that this respondent in behalf of the said bondholders, submits itself to the jurisdiction of this court, and appears in this court in accordance with the summons and order of the court in the premises, with full confidence that this court will accord it, and the bondholders represented by it, full justice and equity, and will determine and adjudge that the said respondent is entitled in behalf of the said bondholders represented by it to a first lien upon the money, the proceeds of the property sold by the court in this cause, the immediate distribution of which is asked by all parties to this cause other than by this respondent, which is assured and pleads and prays that this court will not require it to surrender the bonds of the said bondholders represented by it as trustee, except upon the terms and conditions to which said bondholders have voluntarily agreed, in case the surrender and cancellation of said bonds was deemed essential by the court for the benefit of the other parties who have voluntarily appeared in these proceedings.

Fourth. And this respondent particularlp alleges and calls the attention of the court to the facts as set out in the record, (39) that the claims of all the other parties to these proceeding to the fund now in the hands of the court in this cause, the proceeds of the sale of the property over which this court had, and has ever had, exclusive jurisdiction, are made against this respondent by parties who have appeared voluntarily in these proceedings to assert their claims, right and interest, and have, and are now asserting their right and interest and claim, and who require that this respondent be divested of its first and prior lien which it held upon the property heretofore sold in these proceedings for their benefit, and to enable them to have immediate distribution of said fund in satisfaction of their said claims; that, with the exception of the claim of the said Guardian Trust and Deposit Company, the complainant in these proceedings, which is made altogether subject to the prior right of your respondent to the full extent of its lien to secure the bonds issued under the deed of trust to it hereinbefore mentioned, the said other claimant and parties to these proceedings all claim to deprive your said respondent of its rights in the said premises, which accrued to it upon the execution of the said deed of trust made to it by the said Greensboro Water Company, dated January 10th, 1888, by reason of certain alleged negligent breaches of a contract made *been* the Greensboro Water Supply Company, the defendant in these proceedings mentioned, and the City of Greensboro, to-wit: in the year 1898 and 1899, with which body corporate at the dates of the commission of the said wrongs alleged in said

causes of action, your respondent or its assignor, the Greensboro Water Company, never had any relation, contractual or otherwise, or transaction or connections whatsoever, nor can it be affected by the acts, negligencies or defaults of the said Greensboro Water Supply Company to the said City of Greensboro under said contract, or to any person whatsoever, and cannot, by reason of such acts, negligences and defaults of the said defendant, the said Greensboro Water Supply Company, be deprived of its rights in the property aforesaid or the proceeds of sale thereof, held by it in solemn trust, secured by the deed of trust aforementioned.

Fifth. That, further, with the exception of the claims of C. J. Gorrell, in these proceedings mentioned, which was prosecuted to judgment in the Superior Court of Guilford County, North Carolina, prior to the appointment of the receiver in this cause and the assumption of the jurisdiction of this court over the property in these proceedings sold, the said defendants, viz.: all the other parties to these proceedings, except the complainant (40) in these proceedings mentioned, instituted or prosecuted their said claims to judgment in the Superior Court of Guilford County, without making the receiver of this court a party to their proceedings, and without the leave of this court being had and obtained, notwithstanding the appointment of this receiver in these proceedings by this court, and the assumption by this court of the jurisdiction over the property and premises and the funds, the proceeds thereof, in these proceedings mentioned, for the express purpose of determining all the indebtness of the said defendant company, the Greensboro Water Supply Company, and the lawful liens and priority of the various classes of cerditors, and notwithstanding that this court, according to the prayer of the bill in these proceedings, had expressly enjoined and prohibited all persons whatsoever, from interfering with said receiver as to the possession of the property of said company, etc., or from suing said receiver in any court of law or under form of any proceeding at law, except upon application to this court, and obtaining permission to take such action, and that such proceedings were adopted by the said other parties to this cause with the express purpose, object and intention of obtaining a different construction, jurisdiction and application of a different rule of law from that which was known to be the rule and law of this court, to their alleged claims against said defendant company, over whom and over whose property this court had taken complete and final jurisdiction for the purpose of allowing and ascertaining all rightful claims; that not only had this court assumed such jurisdiction over the said defendant company and its property and premises, but that

the said jurisdiction was vested, and, under the terms of the bill in this cause, was alleged to be in this court by virtue of the citizenship of the parties, both plaintiff and defendant, and that it is equally and continuously in this court by reason of this citizenship, when the controversy is seen to be between the original complainant in this cause and the said defendant and the original complainant in this cause and all the other defendants and claimants, or between all other parties to this cause seeking to enforce their rights against this respondent.

Sixth. And your respondent particularly avers and charges that the validity of the rights and actions and claims of said several claimants, Helen G. Brown, A. M. Scales, assignee of A. A. Hinkle; A. M. Scales, assignee of Hodgin, Pegram & Company, and the Southern Stock Mutual Insurance Company (41) and of B. J. Fisher, reported by the special master in these proceedings appointed, as filed in this cause against the said Greensboro Water Supply Company, the defendant in these proceedings mentioned, when made and asserted against your said respondent, who was in nowise a party to said proceedings, and who was not even a party to these proceedings until the process of this court was served upon it and returned the 5th day of August, 1901, is solely to be determined by this court, and that such claims are in no respect valid claims against said defendant in these proceedings mentioned, and that it could not be made and never could have been made liable upon such a cause of action as is set out in the records relied upon by said claimants in this court, or under the law and judicature administered by the Federal courts, and that further and particularly upon the examinations of the records of such claims, it will be seen that the causes of action therein set out are not of a nature which can be enforced against the fund in these proceedings, the proceeds of the property sold by the process of this court in these proceedings, at the expense of, or prior to, or in any way to the detriment and diminution of the lien of this respondent, given to it and secured to it under the deed of trust made to it by the Greensboro Water Company, dated January 10th, 1888, viz.: Exhibit C, for the benefit of the holders of said bonds issued under said deed of trust.

Seventh. And your respondent respectfully submits to the court that it will not permit it to be divested of the lien given to it for the benefit of the holders of the bonds mentioned in said deed of trust made to your respondent, except upon equitable terms, such terms being full value and compensation for the right and lien held by your respondent, or a sum which it may be willing to receive as the equivalent of such value or compensa-

tion as hereinbefore mentioned, and that this court will, in the exercise of its jurisdiction, which belongs to it exclusively as between the parties claiming said fund, both by reason of the citizenship of the opposite parties and by reason that it had, and has, full and exclusive jurisdiction of the property and of the proceeds of sale in these proceedings mentioned, examine and determine the issues between the said other claimants and your said respondent, under and according to the rules of law and the system of judicature and procedure which is binding upon this court, and will determine that this respondent is in no way liable or responsible, or subject to be deprived of its prior right to the full amount of its said lien in the said fund in the hands of the court, at the claims of the said claimants next hereinbefore mentioned, by reason of any right, claim or demand whatsoever against the said defendant, the Greensboro Water Supply Company, and especially by reason of the alleged claim or right or cause of action against said company set out in the records of the said claims heretofore filed in these proceedings; and that this court will not order this respondent to be divested of its said lien or claim, or bonds of the said bondholders represented by your respondent to be delivered up and cancelled except upon the payment of the full amount of the principal of said bonds and the interest accrued on each of said bonds, to the date of such payment of said bonds upon the deposit of the same in this court.

And, having fully answered, this respondent humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained."

DECREE, 10TH OF OCTOBER, 1894, ENTERED IN THE ORIGINAL CAUSE OF MIDDENDORF *v.* GREENBORO WATER COMPANY, FILED HEREIN AS A PART OF THE RECORD.

"Order Directing Sale of the Property.

(42)

"This cause coming to a hearing upon the bill of complaint, the answer of the trustees, R. R. King and Archibald H. Taylor, and the answer of the defendant, the Greensboro Water Company, and the reports of the receiver, James D. Glenn, filed in this cause to date, and all other proceedings in said cause being duly read and considered, upon consent of the complainants by their counsel, Archibald H. Taylor, and of the defendant, the Greensboro Water Company, by its counsel, Robert R. King, the court doth order, adjudge and decree as follows, viz.: It appearing to the court that the plaintiffs, the second mortgage bondholders, are entitled to have a decree of foreclosure of said mortgage for defaults in the terms thereof,

and a sale thereunder, subject only to the lien of the first mortgage in these proceedings mentioned, the said Robert R. King and Archibald H. Taylor are hereby appointed commissioners to sell the mortgaged property in these proceedings mentioned, being all the property, rights and franchises of the Greensboro Water Company, and all the property and rights in the hands of the receiver, James D. Glenn, heretofore appointed by the court in this cause, and such sale shall be subject to the lien of the first mortgage bonds under the first mortgage as being the same in these proceedings mentioned, but the rights of the defendant body corporate, and of all other persons or bodies corporate claiming under the said defendant company, shall be and are forever barred and discharged, and the course and manner of said sale shall be as follows: said commissioners shall first give not less than three months notice of the time, place and terms of sale by advertisement at least twice a month in some newspaper published in Guilford county, North Carolina, and in some newspaper published in the City of Baltimore, Maryland, and such other advertisement as may to said commissioners seem proper, and said sale shall be at public auction to the highest bidder in the City of Greensboro, North Carolina, and the terms of sale shall be as follows: the purchaser being the highest bidder shall pay to the said commissioners at the time of the sale cash on account of the purchase money for the property to the amount of five hundred dollars, and immediately upon the ratification of the sale, which may be reported to this court for ratification in vacation or during term immediately after the sale, said purchaser shall pay or deliver to said trustees on account of said purchase money cash or receiver's certificates now issued and outstanding under the orders of this court in this cause to the full amount of said receiver's certificates, and the balance of said purchase money shall be payable and dischargeable in money or in evidences of debt due by the defendant company, be the same due by second mortgage bonds, judgments or open accounts, ratably and proportionately, in the order in which the same shall be reported by the special master heretofore appointed in these proceedings and confirmed by this court, to the full extent of the balance of said purchase money, and the balance of said purchase money, if any, shall be paid and distributed to the stockholders of said defendant company ratably and proportionately according to their respective holdings, and said commissioners, prior to the day of sale, shall give bond, with security to be approved by a judge or clerk of this court, conditioned for the faithful performance of their duties under this decree, in the penalty of five thousand dollars, and it is further (43) declared not to be the intent and effect of the terms of this decree to determine and establish in any way the order of

the rights and priorities of the parties to this cause, or the priority of lien of any claimants or intervenors against the property in these proceedings mentioned, or the proceeds thereof to be brought into court, and the cause is continued for further proceedings. In open court October 10th, 1894.

ROBERT D. PICK,
U. S. Judge."

(44)

EXTRACT FROM DEED 30TH APRIL, 1896, FROM ROBERT R. KING AND ARCHIBALD H. TAYLOR, COMMISSIONERS IN THE LAST-NAMED CAUSE OF MIDDENDORF *v.* GREENSBORO WATER COMPANY, TO HUGH L. POPE, WHO IN TURN CONVEYED THE PROPERTY, FRANCHISES, &C., SOLD THEREIN TO THE GREENSORO WATER SUPPLY COMPANY.

"To have and to hold the property, rights, franchises, and privileges hereby specially mentioned to be conveyed unto and to the use of the said party of the second part, his assigns and associates as he may hereafter declare the same by deed or other conveyance and allotment, whether by the name of the Greensboro Water Supply Company or by such other corporate name as may be lawfully assumed and declared by the said party of the second part and his associates as they may or become incorporated according to law. Subject, however, to the operation and effect of a mortgage dated the 10th day of Jan'y, eighteen hundred and eighty-eight, and executed by the Greensboro Water Company unto the Guarantee Trust and Safe Deposit Company and recorded among the land records of Guilford county, North Carolina, in the office of the Register of Deeds of said county, purporting to secure an issue of fifty thousand dollars ($50,000) of first mortgage bonds of said company.

In witness whereof the said parties of the first part have hereunto set their hands and seals this 30th day of April, in the year one thousand, eight hundred and ninety-six."

DECREE OF THE COURT BELOW APPEALED FROM.

(45) "This cause coming on to be heard, and having reference to the opinion filed directing a decree to be entered giving priority to the lien of the judgments of B. J. Fisher for $25,000.00; A. M. Scales, assignee of A. A. Hinkle, $3,200.00; A. M. Scales, assignee of Hodgin, Pegram & Co. for $1,800.00, and Helen G. Brown for $3,000.00 against the Greensboro Water Supply Company, over the lien of the mortgages therein referred to.

Upon consideration, it is ordered, adjudged, and decreed by the court that the said judgments are entitled to priority of payment over and above the lien of the mortgages set out and described in the papers, writings and records in the proceedings filed in this cause:

Now, upon motion of counsel for said judgment creditors, it is ordered and decreed that out of the monies and funds now in the custody of this court, arising from the sale of the property of the Greensboro Water Supply Company to the city of Greensboro, and held for distribution under the orders of this court, that the receiver in this suit pay to B. J. Fisher, or his attorneys of record, the sum of twenty-five thousand ($25,000) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the Superior Court of the county of Guilford, North Carolina; to A. M. Scales, assignee of A. A. Hinkle, or his attorneys of record, the sum of three thousand and two hundred ($3,200) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to A. M. Scales, assignee of Hodgin, Pegram & Co., or his attorneys of record, the sum of one thousand and eight hundred ($1,800) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court; to Helen G. Brown, or her attorneys of record, the sum of three thousand ($3,000) dollars, with interest thereon from the 14th day of January, 1901, the date of the docketing thereof in the said Superior Court, said interest on the said several judgments to be at the rate of six per centum per annum until paid.

It is further ordered that the costs, both in the State Court and in this court, incident to and on the said several judgments, be likewise paid by the said receiver out of the said funds.

And this cause is retained for further orders and directions.

Let this decree be enrolled.

This March 24, 1902."

As witness our hands this 14th day of July, 1904.

NATHAN GOFF.
Senior Circuit Judge.

THOS. R. PURNELL,
Dist. Judge, E. Dist. N. C.

EDMUND WADDILL, JR.,
Dist. Judge, E. Dist. Va.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the original certificate of questions or propositions of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 21st day of July, A. D., 1904.

[Seal of United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY, Clerk,
U. S. Circuit Court of Appeals, 4th. Ct.

By CLAUDE M. DEAN,
Deputy Clerk.

FILE COPY.

Office Supreme Court U. S.
FILED
MAY 29 1905
JAMES H. McKENNEY,
Clerk.

APPLICATION FOR WRIT OF CERTIORARI.

Supreme Court of the United States.

OCTOBER TERM.

No. 286. 75.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, APPELLANTS,

vs.

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ARCHIBALD H. TAYLOR,
JOHN PRINCE BRUCE,
W. P. BYNUM, JR.,
For Appellants.

Supreme Court of the United States.

OCTOBER TERM.

No.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, APPELLANTS.

versus.

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

THE SUPREME COURT OF NORTH CAROLINA DECIDED THAT A WATER COMPANY, BY VIRTUE OF ITS CONTRACT WITH THE MUNICIPALITY TO SUPPLY WATER, WAS LIABLE FOR A LOSS BY FIRE FOR FAILURE TO SUPPLY WATER IN ACCORDANCE WITH THE CONTRACT TO A CITIZEN, AND ALSO THAT SUCH A FAILURE WAS A TORT. THE CIRCUIT COURT OF THE UNITED STATES, BY ITS DECREE SET OUT

IN THE CERTIFICATE, DECIDED THAT IT WAS BOUND BY THESE DECISIONS OF THE STATE COURT OF NORTH CAROLINA, AND REFUSED TO EXAMINE THE QUESTION AS TO WHETHER THERE WAS ANY LIABILITY UPON THE WATER COMPANY BY REASON OF SUCH FAILURE, AND, THAT BEING A TORT, BY REASON OF SECTION 1255, N. C. CODE, THE JUDGMENT THEREFORE HAD PRECEDENCE OVER THE MORTGAGES UPON THE PROPERTY, ONE OF WHICH MORTGAGES HAD BEEN PLACED THERE BY A PREDECESSOR COMPANY, AND THE OTHER BY THE COMPANY ALLEGED TO HAVE COMMITTTED THE TORT. THE QUESTIONS INVOLVED, AND UPON WHICH ANSWERS ARE ASKED, ARE, FIRST, WHETHER THE UNITED STATES COURTS SHOULD HAVE BEEN BOUND BY THESE JUDGMENTS AND DECISIONS OF THE STATE COURT; AND, SECOND, WHETHER, IF NOT SO BOUND, IT MUST NOT DECIDE THAT THERE WAS NO LIABILITY UPON THE WATER COMPANY, AND THAT THE LIABILITY ALLEGED WAS NOT ONE IN TORT, BUT IN CONTRACT, WHICH COULD NOT TAKE PRECEDENCE OVER THE MORTGAGES IN QUESTION. THE SUGGESTION MADE HERE IS, THAT BY REASON OF THE POSSIBLE INSUFFICIENCY OF THE QUESTIONS AND STATEMENT THEREWITH IN THE CERTIFICATE THE WHOLE RECORD IS NECESSARY TO ENABLE THE COURT TO DETERMINE THESE QUESTIONS, THEIR GRAVITY AND IMPORTANCE APPEARING.

To the Honorable, the Judges of said Court:

This petition, in the nature of a motion and suggestion of the appellants, respectfully shows unto the Court the following reasons why it is necessary and proper, in order to the determination of the questions certified by the Circuit Court of Appeals below, and in order that justice may be done between the parties to this controversy, that this Court shall "require that the whole record and cause should be sent up to it for its determination, and thereupon decide the whole matter in controversy," as is particularly provided in the Act known as the Evarts Act, 26 St. at L. Ch. 517.

I.

As appears from the Record herewith, and the case stated below, this case is one in which a Writ of *Certiorari* should most appropriately be granted, inasmuch as the decision in the Circuit Court of the Fourth Circuit was in conflict with the law as laid down in the United States Courts in other circuits, and in the highest court of every State, except one, in the United States, and also in this Court, as we believe.

If the case or questions be of gravity and importance, the above proposition furnishes ground for granting the Writ of *Certiorari*. That the questions are such, sufficiently appears from the Certificate of the Court of Appeals, which has already sent the case here. But unless the "Statement from Records" contained in the Certificate sent from the Court below, be technically all sufficient in the eyes of this Court, there is danger of the questions certified being sent back unanswered, in which case, if the decision of said Circuit Court remains, the conflict of laws will remain to the total destruction of the rights of these appellants, and of all others in like case, at least in the Fourth Circuit, unless the relief of the *Certiorari* be granted at the end of this double litigation, which can now be done once for all with most economy of time, cost and labor. We append a brief statement of the case appearing from the Record herewith, and which is nowhere in conflict with the statement in the "Certificate" here, although such Certificate may need and receive illumination from it.

STATEMENT OF THE CASE.

September 29, 1900, upon a bill filed by the appellant, the Guardian Trust and Deposit Company, Trustee named in the mortgage, a receiver was appointed for the Greensboro Water Supply Company, (which owned the water works in Greensboro, N. C.,) and a master appointed to determine all liens and indebtedness and their order. (Record, pages 1 to 10; Certificate, page 2.) The bill stated that there was a prior mortgage upon the property, put there by a prede-

cessor company, the Greensboro Water Company, before the defendant company acquired it, and subject to the operation of which, it received all its title in the property, and the mortgagee there referred to, the Guarantee Trust and Deposit Company being the appellant here, was made a party defendant and answered, claiming a first lien prior to all others upon the property. (Record, pages 40, 248, and Certificate, page 31.) The appellees appeared before the Master and filed their claims, being upon judgments recovered against the defendant Water Company alone, in the Superior Court of Guilford County, N. C., subsequent to the appointment of the receiver, and to which he was in no way made a party, nor were the said mortgagees. (Record, pages, 48, 54, 55, 261 to 288; Certificate, pages 10 to 30.) The report of the Master, (Record, pages 48 to 56, inclusive,) not excepted to by the appellees, said judgment-creditors, found the liens upon the property as occurring in the above order and stated the claims of the appellees as follows:

"XI.

"That while the said Greensboro Water Supply Company was in the course of business supplying water to the city of Greensboro, under the contract marked Complainant's Exhibit B, a fire occurred destroying the property of several of the citizens of Greensboro, including the property of Charlotte J. Gorrell, Helen G. Brown, A. A. Hinkle, Hodgin, Pegram & Co., and B. J. Fisher, and the cause of action of the several claimants upon which the several judgments were recovered as set out in finding No. 8, was that said Greensboro Water Supply Company failed to supply water sufficient to extinguish said fires and through their failure to furnish *said water under the contract aforesaid*, marked Exhibit B, claimants' properties, respectively, were destroyed." (Record, page 55.)

These judgment-creditors, the appellees here, claim that contrary to the order in which the mortgages and judgments

actually took place in point of time, their judgments are to be preferred to the mortgages, because of a Statute of North Carolina, known as Section 1255, which is as follows:

"Statute of North Carolina, being Section 1255 of the Code of that State.

"Mortgages of incorporate companies, upon their properties or earnings, whether in bonds or otherwise, hereafter issued, shall not have the power to exempt the property or earnings of such incorporation, from the execution for the satisfaction of any judgments obtained in the Courts of the State, against such incorporation, for torts committed by such incorporation, its agents or employes, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgages to the contrary notwithstanding." (See Certificate, page 37 and page 9 "Statement B." Record, page 389.)

II.

The questions then, whether judgments subsequent to mortgages upon a company's property are to be adjudged prior and preferred to such mortgages by reason of the North Carolina Statute, involves two main questions, viz: First, whether such judgments are for a lawful cause of action, according to the law binding upon the United States Courts; and second, whether the cause of action appearing in these judgments corresponds to the definition of the cause of action, viz: "torts committed" which are intended to be preferred by the North Carolina Act above quoted.

III.

These questions are attempted to be presented by the three which are certified on page 2 of Certificate, but in the light of the rules applied to such questions by this Court, an obstacle, which may prevent this Court from giving the categorical answers which are requisite, may unfortunately appear in the form of "Statement from Records," which

follows on page 2 of Certificate. This statement does not state the case or facts as a finding or narration by the Circuit Court of Appeals, but merely recites the proceedings and excerpts from the Record in said Circuit Court of Appeals, ending with the decree of the Circuit Court, which was heard on appeal in the Circuit Court, but not decided below. If this Court should take the view that such a "statement" does not meet the requirements of the rules, then the questions would go back unanswered, and as the parties here could not enter an appeal as of right to this Court, but only pray for their much needed remedy by a petition for a Writ of *Certiorari*, they now respectfully ask for an order in that nature now, so that there may be but one hearing and the rights of all parties be finally decided. That the case is one which under the law justifies such an order, we believe will appear in the brief argument which follows.

IV.

First Question Certified.

"First. Whether the fact, that under the decision of the Supreme Court of North Carolina, an action can be maintained, by a citizen and taxpayer of the State, against a Water Company organized under the laws of the State, contracting with the city, (of which said citizen is a taxpayer and inhabitant) to furnish the city and its inhabitants with water for domestic and public purposes, and also for the purpose of extinguishing fire, for damages occasioned by the burning of the building within the city belonging to such citizen and taxpayer, because of the alleged negligent failure to supply and furnish sufficient water and pressure from its engines and pumps to extinguish fires, the Circuit Court of the United States, sitting in equity in such case, in a suit for foreclosure of a mortgage given by the water company, should recognize the existence of such cause of action, and whether or not it is concluded by the rendition of a final judgment in the State Court in favor of the persons whose property has been destroyed by fire."

The First Question (Certificate page 2) arises by reason of the circumstance that the State Court below, in a suit to which neither the mortgage bondholders, nor the receiver appointed by the U. S. Circuit Court, were parties, decided that this Water Company, supplying water to the municipal corporation known as the City of Greensboro, was liable for the loss of property belonging to a private citizen, a taxpayer, by fire, by reason of the negligent failure of said defendant to comply with its contract. (Certificate page 2, Record, pages 167, 162, 287, 289.) The highest Court of the State in the case of the first of these judgment-creditors, which came before it, Charlotte J. Gorrell, decided that the Water Company was liable because the citizen and taxpayer was inferentially a party to the contract made between the City and the Water Company "and as a beneficiary of the contract, is entitled to sue."

Gorrell vs. Water Co. 124 N. C. 337.

Now, the Circuit Court of the United States, in the decree quoted (Certificate page 4) decided, that it was bound by this decision, and that Mrs. Gorrell's judgment and the judgment of all the other creditors must be enforced against this Company, prior to the lien of the mortgages placed upon its property many years previous to the happening of the fires.

See—Guardian Trust and Deposit Co. vs. Water Co., 115 Fed. R. 184.

The question is, therefore, whether the U. S. Circuit Court below, which had taken jurisdiction of this property, under a bill filed to enforce the mortgages and ascertain the liens against the property in their order, was bound by a judgment against the Company in a State Court to which neither these mortgagees, nor the receiver, were parties, or whether it was not bound to examine for itself the causes of action on which these judgments were founded, and determine their

validity, and if valid, the order of lien of the mortgages and the judgments.

We respectfully submit that this Court has most plainly decided this question in an identical case, viz:—

Hassall vs. Wilcox, 130 U. S., page 503,

from which we quote:

"And although Wilcox brought the suit and obtained his judgment in the State Court prior to the filing of the present bill, we do not think it could be held, that the trustee under the mortgage, or the bondholders, were bound by that judgment rendered in a suit to which they were not parties. Although they had a right to intervene in that suit, they were not obliged to do so, nor was Wright obliged to prosecute the suit which he brought in the State Court. They had a right to come into the Circuit Court of the United States to contest the priority of lien, and as his claim originated after the mortgage was made, *compel him to approve affirmatively the existence and priority of his lien under the statute of Texas.* He undertook to do so, but the master reported that he found, from the evidence, that the note on which the judgment was predicated, included amounts not secured by a lien under the Act of 1879, as well as amounts for which a lien was given under that Act, and that Wilcox had no lien prior to the first mortgage bondholders."

And again briefly:

"It, the Constitution, did not make the judgments of other States domestic judgments to all intents and purpose, but only gave a general validity, faith and credit to them *as evidence.* No execution can issue upon such judgments *without a new suit in the tribunals of other States.* And they enjoy not the right of priority of lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments."

Wisconsin vs. Pelican, 127 U. S. 292.

And again, Judge Taft, speaking for the U. S. Court of Appeals, Circuit:

"It is said, however, that Wilson has recovered a judgment against the Railroad Company as principal contractor to the full amount of his claim. That is true, and though the judgment was rendered by default, *there was no fraud in procuring it*, and it is therefore conclusive *upon the Railroad Company*. The judgment is not, however, evidence *of any indebtedness against the Railroad Company such as* to give Wilson's claim priority of lien over the bonds in a controversy with the bondholders. This is settled by the case of Hassall vs. Wilcox, 130 U. S. 493."

"It therefore follows from Hassall vs. Wilcox that Wilson's judgment against the Railroad Company, to which the Central Trust Company was not a party, does not bar the Trust Company as mortgagee and trustee for the bondholders from contesting the validity of this claim against the Railroad Company, etc., etc."

Central Trust Company vs. Condon, 67 F., Page 704.

And again, and again—

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296.

Keokuk vs. Missouri, &c., 152 U. S., page 301.

Brooks vs. Burlington, 107 U. S. 443.

"It is consequently the duty of the Court below to consider and determine for itself the question of the petitioner's right to recover, as well as the amount of such recovery, in case *the question of the petitioner's right to recover* was decided in her favor. Both questions were raised by the answer to the petition *and should have been examined and determined by the Court below independently of the adjudication of the State Court.*"

Central Trust Co. vs. Hennen, 90 F. 595.

Therefore, unless this first question in the Certificate is answered to the Court below, the mortgagees in this case may be deprived of their lien solemnly conveyed to their Trustee, chosen for the purpose of giving them the protection of the United States Courts, its law and administration, because a State Court, long after the rights of the parties had arisen, decided a water company was liable to citizens and tax payers under a contract with a municipality such as is in evidence. The law relating to this question has been stated in the United States Courts whenever the question arose uniformly, and as follows—

Quoted from Boston S. D. & T. Co. vs. Salem Water Co., 94 F. R. 240.

"That this action is not founded upon any common law duty and does not therefore sound in tort is quite evident; that it is not based upon a contractual relation between the parties has been, with one exception, uniformly held in every jurisdiction within the United States where the question has arisen. (Davis vs. Water Co., etc.) The general doctrine held by the foregoing cases is that where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the Water Company as will authorize such resident or citizen to maintain an action against said Water Company for the injury or destruction of his property by fire caused by failure of the Water Company to fulfill its contract, *and this is held even where the ordinances granting the Water Company its franchise provides that the Water Company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the Water Company to furnish sufficient amount of water to put out the fires.*"

See Mott vs. Man. Co. and other cases cited, *supra.*

"The only case in all the books where the Water Company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of Paducah Lumber Company vs. Paducah Water Supply Company, 89 Ky. 340, 12 S. W. 554 and 13 S. W. 249, in which case it was unnecessary for the Court to have held this doctrine, as there was a private contract between the Water Company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticized by the courts of the various States in which this case has been cited. That the city owning its own water works cannot be held liable for failure to furnish sufficient water supply to extinguish fires is indisputable."

2d Dillon, Mun. Cor. 975, etc., etc.

"If the city itself cannot be held liable for damages resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of contract between the Water Company operating under a franchise from the city, it is clear upon principle, as well as authority, that *no legal obligation exists on the part of such Water Company and in favor of the individual citizen* to maintain sufficient pressure to extinguish fires which may occur upon the premises of such individual citizen, and there was no contract between the intervening petitioners and the Company, or the city, that in case of fire he should be reimbursed for any loss he might sustain."

Boston Safe Deposit and T. Co. vs. Salem Water Co., 94 F. 240-1.

And again, another U. S. Court decision in the Eighth Circuit in which the case of Gorrell vs. Greensboro Water Supply Co. was especially noted and discredited.

Metropolitan Trust Co. vs. Topeka Water Co., 132 F. 702, opinion by Judge Pollock.

The law on this subject as found in the U. S. Courts quoted above had been uniformly held in every State in the Union, and is the law in England. See—

Vrooman vs. Turner, 69 N. Y. 480.

Becker vs. Water Works Co., 79 Iowa, 419; 44 N. W. 694.

Britton vs. Water Works Co., 81 Wisconsin, 48; 51 N. W. 84.

Hayes vs. City of Oshkosh, 33 Wisconsin, 314.

Nickerson vs. Hydraulic Co., 46 Conn. 24.

Eaton vs. Water Company, 37 Neb. 546; 56 N. W. 201.

Beck vs. Water Works Co., 11 Alt. 300 (Pa. Sup. Court).

Stone vs. Water Co., 4 Pa. Dist. Rep. 431.

Phœnix Ins. Co. vs. Trenton Water Co., 42 Missouri (App.), 118.

Howsmon vs. Water Co., 119 Missouri, 304 and note; 24 S. W. 784.

Fitch vs. Water Co. (Ind. Sup.), 37 N. E. 982.

Foster vs. Water Co., 3 Lea, 42.

Ferris vs. Water Co., 16 Neb. 44.

Fowler vs. Water Co., 83 Ga. 219; 9 S. E. 673.

Mott vs. Manufacturing Co., 48 Kan. 12; 28 Pac. 989.

Bush vs. Water Co. (Idaho), 43 Pac. 69.

Wainwright vs. Water Co., 78 Hun. 146; 28 N. W. 987.

House vs. Water Co. (Tex. Sup.), 31 S. W. 179.

Water Works Co. vs. Brownless, 10 Ohio, 620.

Wheeler vs. Cincinnati, 19 Ohio, 19.

Taintor vs. City of Worcester, 123 Mass. 311.

Van Horn vs. City of Des Moines, 63 Iowa, 447; 19 N. W. 293.

Howard vs. San Francisco, 51 Cal. 52.

Black vs. City of Columbia, 19 S. C. 412.

Mendel vs. Wheeling, 28 W. Va. 262.

2d Dillon on Mun. Cor., par. 976, note, 4th Ed.

Since the decision of Gorrell vs. Water Company, 124 N. C., quoted above, and of the U. S. Circuit Court Judge in the Fourth Circuit, whose decree is quoted in this Certificate, page 40, decisions to the same effect as the current of authorities have been handed down in the Supreme Court of two States.

The first is the case of—

Nichol vs. Huntington Water Co., Supreme Court of West Virginia, 44 S. E. R. 29.

In this case the Court reviewed all the authorities, and expressly disapproved Gorrell vs. Water Co., 124 N. C., as opposed to the whole current.

The next is the case of—

Wilkinson vs. Water Co., 78 Miss. 400,

in which the Supreme Court of Mississippi decided that there is no liability on the part of the Water Company to a private citizen and taxpayer, for losses by fire owing to Water Company's negligent default in keeping its contract with the city.

But the simple difficulty with this Certificate is, can the Court answer this question, upon which the law is clear everywhere, except for the decision in the Supreme Court of North Carolina, and by the Circuit Judge of the Fourth United States Circuit, both made only in this very case, since the rights of the parties hereto accrued, without having the record in this case before it, from which the facts which form the elements of the questions, may be established? Otherwise these appellants are helpless.

V.

Second Question Certified.

"Second. Whether, because in said suit it was determined by the Supreme Court of the State, that the judgment in such action was based upon a cause of action declared upon in tort, and not in contract, said Circuit

Court of the United States is bound, and cannot for itself determine the question of whether the cause of action, if existing at all, was one arising in tort or contract?"

The Second Question certified arose out of the following circumstances: After the novel decision of Gorrell vs. Water Company, 124 N. C., of which the record is in the record below, these judgment-creditors saw, that all recovery out of the property of the Water Company was valueless, because that Court had decided that the liability of the Water Company arose strictly upon the contract between the city and the Water Company, to which the Court said the citizen was privy. The North Carolina Statute quoted (page 5 of this Petition; Certificate, page 31), gave priority to executions issued upon judgments for "torts committed" by the corporation. Therefore, the judgment-creditors moved the Superior Court of Guilford County, to certify that these judgments were "in tort," so as to exhibit the records of the judgments in that form in the United States Circuit Court. It refused to do this, and an appeal was taken in the Fisher Case. The Supreme Court of North Carolina, the very Court that decided the liability of this Water Company arose *strictly and solely upon its contract*, then decided that the *form of action* was tort, although the only legal obligation arose upon the contract, and could not have arisen or existed without the contract, and consequently that the Certificate from the Court should set out the judgment as being in tort."

Fisher vs. Greensboro Water Supply Co., 128 N. C. 375.

But in so doing, it recognized plainly that its decision could not possibly bind the Court, which had taken jurisdiction of the property of this Water Company for the purpose of determining the validity of all liens, for it closed by saying:

"The defendant in this action is an incorporated company and the plaintiff insists that under Section 1255 of the

Code an execution issued upon a judgment founded on an action for tort has superior advantages in its enforcement over execution issued upon judgments founded upon contracts. As to this, however, we do not express an opinion, as that question is not before us."

Fisher vs. Water Co., *supra.*

But in very truth, this same Court had already answered that question by deciding flatly that it was the facts upon which an action arose, and not the form of action, or form of judgment described in a certificate, which gave the preference or advantage of Section 1255 of the Code of N. C., for in a case, where title was claimed under an execution issued under a judgment of the Superior Court, which contained in its certificate that it was a judgment entitled to the benefits of Section 1255 of the Code, the Supreme Court of N. C. said that the Certificate amounted to nothing, the facts must be re-examined by the Court determining the liens before such a preferential lien could be allowed.

James vs. Lumber Co., 122 N. C. 157.

Therefore, the simple question presented by the Second Question certified here is, did the decision of the North Carolina Supreme Court in Fisher vs. Water Co. relieve the U. S. Court below of the necessity of determining for itself whether the liability of the Water Company was one arising in contract or in tort?

To ask this question is in itself to furnish the answer. Whether a transaction is a contract or a tort, whatever be the liability that may or may not arise from it in either case, is a question which the United States Courts are bound to answer for themselves and decide the rights of the parties accordingly, whatever be the answer a State Court may furnish pending the litigation in the U. S. Court. We quote briefly the statement of this rule from Mr. Justice B. R. Curtis of this Court:

"On questions of commercial law and general jurisprudence the Courts of the United States do not hold themselves bound by the Courts of the States, where they are trying cases, that do not belong any more to the jurisprudence of that particular State, than they do the jurisprudence of any other State."

See—Curtis' Jurisprudence of the U. S. Courts, 234.

We quote again most briefly the language of this Court, asking the Court to bear in mind that the North Carolina Court has not construed or attempted to construe any State statute; on the contrary, has expressly refused to say that it did so, but merely decided, first, that a liability arose upon a contract between a water company and a city in favor of a private citizen and taxpayer; and second, that the breach of this contract was rightfully declared upon in tort. These are principles of commercial law purely.

"But admitting the doctrine to be fully settled in New York, it remains to be considered, where it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that the Courts of New York did not found their decision upon this point upon any local statute or positive, fixed or ancient local usage, but they deduce it from the general principles of commercial law. It is, however, contended that the 34th Section of the Judiciary Act of 1879 furnishes a rule obligatory upon this Court to follow the decision of State tribunals in all cases to which they apply. * * * In order to maintain the argument it is essential, therefore, to hold that the word "laws" in this Section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of Courts constitute law. * * * And we have not known the slightest difficulty in holding that this Section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other

instruments of a commercial nature, the true interpretation and effect whereof should be sought, not in the decisions of the local tribunals, but in the general principles and doctrine of commercial jurisprudence."

Swift vs. Tyson, 16 Peters, 18, from opinion of Mr. Justice Story.

See also—Rowan et al. vs. Runnels, 5 How. U. S. 134, per C. J. Taney.

Liverpool Steamship Co. vs. Steamers Ins. Co., 129 U. S. 397.

B. & O. R. R. vs. Baugh, 149 U. S. 368.

Dennis vs. Murdock, 92 U. S. 494.

R. R. Co. vs. Lockwood, 17 Wallace, 357.

R. R. Co. vs. National Bank, 102 U. S. 14.

Even if the State Court had put a construction upon a State statute, if such construction had been made by the State Court after the rights of the parties arose, as we know the United States Court would not be bound thereby, but must adopt its own interpretation of the law. A brief quotation will illustrate the point:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transaction in controversy occurred, and the case was under consideration of the Circuit Court, no construction of the statute had been given by the State tribunal, contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction, in the administration of said laws, co-ordinate with and not subordinate to that of the State Courts, and are bound to use their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal Courts properly claim their right to adopt their own interpretation of the law applicable to the

case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

Burgess vs. Seligman, 107 U. S. 33.

But the difficulty again is, whether upon this certificate this Court can answer this second question in the form which the law requires, viz.: "Yes, you the U. S. Court below must for yourself determine the question whether the cause of action, if existing at all, was one arising in tort or in contract." To do this, will not the Court have to gain its facts rom the Record, for the reason that the Certificate hardly states them as such?

VI.

Third Question Certified.

"Third. Whether, assuming the existence of such cause of action, and that the same may be maintained in tort, a final judgment in such case against the water company obtained in the Courts of North Carolina, is protected by section 1255 of the code of that state, and should have priority in the distribution of the assets of the water company over its mortgage bonds theretofore issued."

We refer to section 1255 of the code, set out on page 31, of the certificate, and page 5 of this petition. Under this section, a preference over a mortgage is given to an execution upon a judgment for "torts committed by such incorporation." If, as we have seen before, this Court is obligated to instruct the U. S. Court below, that it must define for itself, irrespective of the State Courts, what is a tort committed, within the meaning of this statute, can there be any doubt that the injury or loss which was suffered by reason of the failure of the defendant water company to supply water under the terms of its contract, was not a tort, because the only obligation to supply water at all arose solely by reason of its contract? This particular question has been decided recently in this very Court. We quote as follows:

"Having before it the above act of 1873, amended in 1877, the Court of Appeals in 97 N. Y. page 97, decided in 1894, said that the State authorized the formation of water works companies in its towns and villages, (laws of 1877, chapter 171,) *but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its water from the company so formed.*"

See—Skaneateles Water Co. vs. Skaneateles, 184 U. S. 362.

In a word, says this Court, by virtue of its chartered rights and franchises, there is no duty upon a water company existing by the common law, to furnish water of any standard, or at all. Therefore, if it exists at all, it must exist solely by virtue of the contract, and the breach of such a duty cannot be a tort, even though the action may be declared "or maintained in tort." We quote Chief Justice Bleckley of the Supreme Court of Georgia, in a case already cited—

"We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract's relations, there is superadded a legal command by statute or express law. We ask again where is the State or express law, which require this Water Company to do the acts which plaintiff says it failed to do?"

Fowler vs. Athens Water Co., 83 Ga. 222.

Also U. S. Judge Ricks, before quoted: "That this action is not founded on any common law duty, and does not, therefore, sound in tort, is quite evident."

Boston S. & D. Co. vs. Salem Water Co. 94 U. S. 240.

We need hardly press upon this Court, the definition of a "tort committed," which it is here asked to define for the Court below. But we cite one or two for illustration, that it is

always a wrong independent of a contract, not meaning to say, of course, that the law may not be in effect copied into the contract, but the law or obligation must always exist independent of the contract.

"A tort having been defined to be a wrong independent of a contract, it follows, that if that definition is correct, *there can be no tort founded on contract, and that the so-called tort founded on contracts, are breaches of contract and not torts.*"

Addison on Torts, Section 14, page 20.

We quote further—

"With the obligation of forms of action, artificial distinctions involved in choice of remedies, the juggling with remedies, should disappear. In such jurisdiction the inquiry should be, not as to the remedy formerly given by the common law, but as to the real nature of the right."

1st Jaggard on Torts, pages 28, 29.

And to use the language of Justice White of this Court, quoting Kelly vs. Metropolitan R. R. Co., 1 Q. B. 944: "The distinction is this: If the cause of complaint be for an act of omission or nonfeasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action, (because no duty, apart from contract, to do what is complained of exists,) then the action is founded upon contract and not upon tort."

Atlantic and Pac. R. R. Co. vs. Laird, 164 U. S. 399.

This definition applied here effectually precludes the cause of action from being defined as a "tort committed."

The simple answer that must be given then, is, whatever the form of action that could be maintained under North Carolina law, even if rightfully under that law it could be maintained in tort, inasmuch as it appears from the record in this cause, that there was no breach of duty imposed by

law, viz: either the common law or statute law of the state of North Carolina, but only of the duty imposed by the terms of the contract offered in evidence, there is certainly no tort committed, the damages for which should have priority, in the distribution of the assets of the Water Company, over its mortgage bonds theretofore issued.

We also here call the attention of the Court to the fact, that the mortgage made to the Guarantee Trust and Deposit Company of Philadelphia, referred to in its answer on page 31 of the certificate, was made to that Trustee by the Greensboro Water Company, a body corporate, dated January 10th, 1888. But that all the property of said Greensboro Water Company was sold upon a bill filed against that company, by decree of the Circuit Court of the U. S., dated October 10th, 1894, and a deed made by the commissioners of that Court, April 30th, 1896, which decree and deed appear in the certificate pages 37, 39. The property passed under that decree and deed to the Greensboro Water Supply Company, the defendant in these proceedings here. But as the decree set out, "such sale shall be subject to the lien of the first mortgage bonds under first mortgage, being the same in these proceedings mentioned." The Greensboro Water Supply Company, therefore, having never received any property, except subject to the lien of the first mortgage made to this appellant, the Guarantee Trust and Deposit Company, is alleged to have committed its tort on the 17th, day of June, 1899, four years after it received its property subject to the lien of the mortgage above mentioned. Therefore, by the decree of the U. S. Circuit Court below, the Guarantee Trust and Deposit Company, the appellant, was made liable for an alleged tort committed, not by its own grantor, but by a corporation with which it had no relations whatever. Now the Circuit Court of Appeals in this same Fourth Circuit, decided that a mortgagee could not be made liable for a tort committed under this section 1255, by any other person than its own mortgagor. In a word, it could not have its mortgage super-

seded by the act of a person, with whom it had no relations whatever, and who never received any property except subject to the lien of its mortgage.

See—Julian vs. Central Trust Co., 115 Fed. 956-63, Affirmed by Supreme Court U. S.

VII

In conclusion we suggest, that even if all the questions certified to this Court are answered by it, even then, while there may be a decision by the Circuit Court of Appeals for the Fourth Circuit, yet there will be no decision by the Supreme Court of the fundamental question, viz: whether or not a Water Company having a contract with a municipality to supply water for the extinguishment of fires is liable to a tax-payer and resident of that municipality for the destruction of his property by fire, owing to a failure of the Water Company to supply water in accordance with its contract, not with him, but with his city.

Now the Court of Appeals of North Carolina and of Kentucky, as we have shown, have decided that under these circumstances the Water Company is liable to the tax-payer, but, as has also been shown, the Courts of Appeals of nearly every other State and every Federal Court in which the question has arisen (except in this case) have decided that in such case the Water Company is not liable. Manifestly then, not only these petitioners, but every non-resident Water Company, doing business in the State of North Carolina and Kentucky, and every bondholder of such company, and every non-resident of those two States who is doing, or who contemplates entering into the business of supplying water to cities in those two States, are vitally interested in having an adjudication of this question from the Supreme Court of the United States, and in knowing whether they, as non-residents, will be able to appeal to the United States' Courts to escape this novel liability, whereby they are pratically made insurers of every house in the cities with which they have contracts to supply water;

a liability unheard of, before it was suddenly attempted to be thrust upon them by the Courts of North Carolina and Kentucky.

Clearly then, here is a question of "gravity and importance," which entitles this petitioner to an order in the nature of *Certiorari*, since in no other way can this petitioner present this vital question to this Court and have it once for all decided by this, the Court of last resort in the United States.

For which reasons it is respectfully prayed that the whole record and cause shall be sent to this Court for its determination, and that this Court thereupon decide the whole matter in controversy.

And will ever pray.

ARCHIBALD H. TAYLOR,
JOHN PEIRCE BRUNS,
WILLIAM P. BYNUM, JR.

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JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

October Term, 1905.

No. 74.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND SAFE DEPOSIT COMPANY, *Petitioners*,

vs.

B. J. FISHER, A. M. SCALES, Assignee of A. A. Hunt; A. M. SCALES, Assignee of Hunter, Penman & Co., AND HELEN G. BROWN, *Respondents*.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

ARCHIBALD H. TAYLOR,
JOHN PRESTON BELLS,
W. P. BYRUM, JR.,
For Petitioners.

PETITIONER'S BRIEF.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 75.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, *Petitioners*,

vs.

B. J. FISHER, A. M. SCALES, Assignee of A. A. HINKLE; A. M. SCALES, Assignee of HODGIN, PEGRAM & CO., AND HELEN G. BROWN, *Respondents*.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE.

This case was first brought to this Court upon a certificate of questions by the Circuit Court of Appeals for the Fourth Circuit, and upon petition of the appellants in that Court, a writ of *certiorari* or order in that nature was granted, bringing the whole record into this Court for review. The following is a statement of the case upon which this Court will be called on to pass:

The bill of complaint upon which the case arose below (see Record, page 1, Certificate, page 436), was filed September 29th, 1900, on behalf of the Guardian Trust and Deposit Company of Maryland vs. the Greensboro Water Supply Company, a corporation of the State of North Carolina, and asked for the appointment of a receiver and the foreclosure of a mortgage dated July 1st, 1896, from said defendant company to said complainant, petitioner here, to secure a certain issue of bonds then alleged to be in default, and the ascertainment and enforcement of all liens against the property in due order of priority. The bill stated with particularity, that this mortgage on the Greensboro Water Supply Company's property, was subject to a prior mortgage dated January 10th, 1888, and made by the Greensboro Water Company, which had owned the property in question, prior to its acquisition by the Greensboro Water Supply Company, and that the whole issue of the bonds secured by this prior mortgage was unpaid and outstanding. Upon the filing of the bill, a receiver was appointed (see Record, pages 9 and 10 and 43), and also a master was appointed, and the cause referred to him, to ascertain and report to the Court, "all the liens upon the property in the previous proceedings mentioned and the interest of any parties therein who may appear in accordance with the terms of said order, and the claims and demands of all persons whatsoever against said defendant company, who may duly prove the same and the lawful order and priority of all such claims against the funds in the hands of the receiver, or to come into his hands, and against the proceeds of the sale of the property in these proceedings mentioned, and further that said master should give notice that he would receive such proof, and on failure so to make any proof, any and all persons will be excluded from any interest and right in the premises or participation of the assets in these proceedings." (See Record, page 17.) After the appointment of the receiver, the property, the subject of the proceedings, was sold to the city of Greensboro,

and the Court passed an order requiring the Guarantee Trust and Deposit Company of Philadelphia, the trustee under the mortgage from the Greensboro Water Company of date January 10th, 1888, before referred to, "to appear in the Court and plead and answer to the complainant's bill." (Record, page 40.) Pursuant to this order, the said Guarantee Trust Company filed its answer (see Record, page 249), setting up the claim in behalf of the bondholders under its mortgage and alleging particularly, that these bonds were a first lien upon all the property and proceeds of sale of the same in the Court prior to the mortgage of the complainant in the cause, and prior to the claims or liens attempted to be asserted by certain judgment creditors, the respondents in this Court, who had appeared before the master appointed by the Court, claiming that these judgments had a priority over both the mortgages, under section 1255 of the North Carolina Code, hereinafter set out at length. The Guarantee Trust and Deposit Company, in this answer, denied any and all right to a lien for these judgments as against the mortgages, and alleged, with particularity, that the mortgage which it held was made to it by the Greensboro Water Company on January 10, 1888, and that a suit for foreclosure by Middendorf and others, second mortgagees of that property subsequent to its own mortgage, (the record of which had been filed before the master, and appears in these proceedings from page 188 to 224 of the Record), had in no way affected the lien and title of this trustee company to the property, because, as it appeared by said suit, the sale which had taken place April 6, 1896, to Hugh L. Pope, afterwards incorporated as the Greensboro Water Supply Company, had been made expressly subject to the lien of its mortgage. (See decrees of sale, pages 216-217-219-220-222-223 of Record.) It said, moreover, that it had never been made a party in any way to the proceedings of said second mortgagees, Middendorf and others, resulting in such sale, and had no knowledge of it, "and never had any relation,

contractual or otherwise, or transactions or connections whatsoever with, nor can it be affected by the acts, negligence or defaults of said Greensboro Water Supply Company." In a word, that whatever wrongful act the Greensboro Water Supply Company, which had purchased this property in 1896, subject to the mortgage made January 10, 1888, to this appellant, had committed, said last named petitioner, said mortgagee in trust, could not be affected by it, because the Greensboro Water Supply Company had never been its grantor, and there had been no mutually assumed relations between them whatever. The master appointed by the Circuit Court filed his report, appearing in the Record on pages 48 to 56, and the evidence and exhibits filed by the various parties before him appear in the Record from pages 57 to 385, inclusive. These exhibits consist of the two mortgages in these proceedings mentioned, and the testimony offered by the trustee for the bondholders, showing what bonds were outstanding, and the records in the cases of B. J. Fisher *et al.*, the judgment creditors, the respondents here, being certified copies in Fisher's case, of the judgment rolls from the Circuit Court of Guilford County, North Carolina, appearing in said Record from page 259 to 385, and the more important part of which is set out in the Certificate of Questions, herein filed, from pages 444 to 465 of said certificate.

But the statement of the case at issue can be completed best and simplest in the words of the report of the special master as follows, (See Record, page 53-55):

"VIII."

"That after the purchase of the properties, rights, franchises and privileges by the Greensboro Water Supply Company from Hugh L. Pope by deed of the 30th of April, 1896, the said Greenboro Water Supply Company took possession of the same, and, under its own franchises and chartered rights, exercised the privileges of a water com-

pany, supplying water to the City of Greensboro and to the citizens of said city and its vicinity, and doing the usual business of a water supply company in the said City of Greensboro, North Carolina. That, in the course of its business as a water company, it entered into a contract with the City of Greensboro for a supply of water to said city, a copy of which is filed and marked complainant's exhibit "B," (being the same as Exhibit A, Record, page 270, and Certificate, page 22, Record, page 45), and under said contract furnished water to the City of Greensboro, up to the appointment of a receiver of the properties of the Greensboro Water Supply Company by this Court, on the 29th day of September, 1900.

"XI."

"That while the said Greensboro Water Supply Company was in the course of business supplying water to the City of Greensboro under the contract marked complainant's exhibit 'B,' (being exhibit A, page 270), a fire occurred, destroying the property of several citizens of Greensboro, including the property of Charlotte J. Gorrell, Helen G. Brown, A. A. Hinkle, Hodgin, Pegram & Co., and B. J. Fisher, claimants above mentioned, and the cause of action of the several claimants upon which the several judgments were recovered, as set out in finding No. 8, was, that the said Greensboro Water Supply Company failed to supply water sufficient to extinguish said fires, and, through their failure to furnish said water under the contract aforesaid, marked exhibit 'B,' (being exhibit 'A,' Record, page 270, above mentioned), claimant's properties, respectively, were destroyed.

"That the case of Charlotte J. Gorrell was tried on demurrer, appealed to Supreme Court, heard in the Supreme Court, tried on its merits and final judgment rendered before the receiver was appointed in this cause. That the other claims upon which judgments were rendered, were instituted

a year prior to the appointment of the receivership aforesaid, and were pending in the Superior Court of Guilford county, but no pleadings were filed therein until after the appointment of the receiver aforesaid."

(From Report of Clement Manly, Master, Record, page 53, 55.)

The cause was first heard in the United States Circuit Court below, and the opinion of that Court, of date March 24, 1902, appears in the Record, pages 385 to 394, together with the decree thereupon, page 394, from which an appeal was taken to the Circuit Court of Appeals, and after several arguments before said Court, the Certificate of Questions heretofore filed in this Court, was sent to this Court, resulting in the order of *certiorari* herein appearing. The Circuit Court below had decided that the claims of these judgment creditors, Fisher and others, which were for losses by fire which destroyed the property of these respondents, —as reported above by the special Master,—and which fires occurred in 1897 and 1899, about three years after the organization and purchase of this water property by the Greensboro Water Supply Company, the said defendant, took precedence over the liens of the two mortgagees, the petitioners here, by reason of Section 1255 of the Code of North Carolina, which is as follows, (See Record, page 389):

"Section 1255. Mortgages of incorporated companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporation from execution for the satisfaction of any judgment obtained in the Courts of this State for labor performed, nor for torts committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

Specification of Errors or Questions for Review.

The assignment of errors upon which the petitioners rely here, were set out in their appeal from the decree of the Circuit Court below, and appear upon pages 398 to 411 of the Record, sent up herewith, and are practically included in the questions, certified up to this Court in the certificate of the Circuit Court of Appeals below, appearing on page 2 of said certificate, and may be summed up as follows:

First. That the judgments of Fisher and others, the petitioners here, obtained in the Superior Court of Guilford County, North Carolina, against the defendant company, after the United States Circuit Court below had taken jurisdiction of the property in these proceedings mentioned, and to which judgments neither the receiver of said Court nor the petitioners, said mortgagees, were parties, were not conclusive or binding in said United States Court against the mortgagees of said property, but that it was the duty of the Circuit Court of the United States to examine for itself these causes of action and the proofs thereof, and to determine whether the same were valid causes of action for any amount against the defendant company, such as an United States Court would recognize and enforce in its own jurisdiction, and under its own system of jurisprudence, and also, exactly what was the nature of such causes of action, whether the same were in contract or in tort, and whether the same should be accorded a lien prior to said mortgages, under section 1255 of the Code of North Carolina, and that it was error in said Circuit Court of the United States below, and would be error in said Circuit Court of Appeals to be concluded or bound by the judgments or decisions of said State Courts.

Second. That in examining into the claims of the said judgment creditors, Fisher and others, the respondents, in this Court, as appearing in the records of the judgments tendered by said appellees, in said proceedings, it was the duty

of the Circuit Court below to have examined the claims and the proofs thereof, and the nature of the causes of action therein appearing, and to have reached its decision upon the same, ascertaining the relative liens or rights to a lien upon the property in its jurisdiction, of the said respondents and petitioners, respctively, irrespective of the decision of the said Superior Court of Guilford County, North Carolina, or of the Supreme Court of the State of North Carolina, made in said cases, (being made subsequent to the accruing of the rights of the said several parties, appearing herein), even if such State Courts had attempted to decide, that the lien of these judgments was prior to that of the said mortgagees, or that the cause of action, and not merely the form of action, was a tort, which said Courts have clearly never done, and that it was error in the Circuit Court of the United States below, and would be error in the Circuit Court of Appeals to accept and be bound by the decision of the Supreme Court of the State of North Carolinia, in the case of Fisher vs. Greensboro Water Supply Company, referred to in the Record, that the form of action in said cause was a tort, or that the cause of action in said suit was a tort.

Third. That upon an examination of the Record, or what is called the Judgment Roll, in the action of B. J. Fisher vs. Greensboro Water Supply Company, in the Superior Court of Guilford County, North Carolina, and the Exhibits or Judgment Rolls of the other judgment creditors, tendered in the United States Circuit Court below, as evidence of their causes of action and judgment, by the respondents here, it sufficiently appears, that under the law and system of jurisprudence recognized and administered by the United States Courts, and all the Courts of the United States, with the exception of the decision of the Supreme Court of the State of North Carolina, decided after the rights of all the parties hereto had accrued, and that the said causes of action, being for damages done by fire to the property of the plaintiffs in said causes of action, by reason of the negligence, or failure

to furnish an adequate water supply to extinguish said fire, as alleged in said complaints, and appearing in said proceedings, resulting in said judgment, were not valid causes of action, such as can be recognized and enforced in the Courts of the United States against said defendant company, and especially against and prior to the lien of the said mortgagees, the petitioners in these proceedings, and that it was error on the part of said Circuit Court of the United States and would be error in said Circuit Court of Appeals, so to recognize and enforce them.

Fourth. That upon inspection of the said records, or Judgment Rolls, of the Superior Court of Guilford county, North Carolina, tendered by said Fisher and others, respondents here, as proof of their claims to a lien under said judgments prior to the lien of said petitioners, the said mortgagees, it appears sufficiently, that the cause of action, if any, set out in said proceedings, arose upon the contract between the City of Greensboro and the said defendant company, therein referred to, and were for breaches of the said contract, and were not torts committed by the said defendant, the Greensboro Water Supply Company, against the plaintiffs mentioned in said actions, and could not be liens in favor of said Fisher and others, the said judgment creditors, respondents here, prior to the lien of the mortgagees, the petitioners here, upon the property of the said Greensboro Water Supply Company, under section 1255 of the North Caroline Code, which refers only to "torts committed," and that it was error in said Circuit Court of the United States below, and would be error in said Circuit Court of Appeals, to decide said causes of action to be "torts," instead of breaches of contract.

Fifth. That it was error in the Circuit Court of the United States below, and would be error in the United States Circuit Court of Appeals, to decide that the defendant company, incorporated as appearing in the Record, and possessing its franchises and rights to furnish water to the said city of

Greensboro and its inhabitants and householders, by virtue of the contract between the Greensboro Water Supply Company and the said city of Greensboro, appearing in the Record, (see pages 270 to 279, Exhibit A, and page 456, Certificate of Questions,) was bound to furnish water of a quantity and quality or of a pressure adequate to extinguish fires in said city of Greensboro, outside of the terms of said contract, and that the actions set out in the said Judgment Rolls in the Circuit Court of Guilford County of said Fisher and others, the respondents in these proceedings, were maintained, or could be maintained by virtue of any other obligations and duties to said Fisher and others, said judgment creditors, and respondents here, other than those set out and contained in the said contract or ordinance of the city of Greensboro referring to said water company in these proceedings set out.

Sixth. That even if the acts, omissions and neglect alleged in the said causes of action, set out in the Exhibits, or Judgment Rolls, of the Superior Court of Guilford county, North Carolina (tendered in the proceedings below as evidence of their claims and liens against the property of the said defendant, the Greensboro Water Supply Company, by Fisher and others, the said judgment creditors—respondents in this Court) were torts committed by said defendant company, such as entitled the said Fisher and others, the said respondents, to a judgment and lien upon the property of said defendant company, prior to the lien of the Guardian Trust and Deposit Company, the mortgagee of the said Greensboro Water Supply Company, the said judgment and the claims thereunder, could not be a lien prior to the lien of the mortgage made by the Greensboro Water Supply Company to the Guarantee Trust and Safe Deposit Company, its mortgagee, because it appears from the Record, that the said defendant, the Greensboro Water Supply Company, never received said property, nor any of it, except subject to the lien, operation and effect of the mortgage from the Greens-

boro Water Company to the said Guarantee Trust and Safe Deposit Company, and consequently by reason of its act, or tort, if such, could not cause or suffe
property which it did not receive, and the sai
Supply Company, the grantor of the said m
Guarantee Trust and Safe Deposit Company, did not commit any tort against the said plaintiffs, B. J. Fisher and others, the respondents here, and did not suffer any judgment by reason of any torts committed by it or alleged to be committed by it, and it was, therefore, error in the Circuit Court of United States below to decide that the lien of Fisher and others, the said judgment creditors, the respondents, was prior to the lien of the petitioner, the Guarantee Trust and Safe Deposit Company, the said mortgagee of the said Greensboro Water Company, and would be error in the Court below so to decide.

Points of Law, or Argument.

The question which arises, therefore, is one between the two classes of bondholders on the one side, and these intervenor judgment creditors of the defendant Company, respondents, here on the other, and the argument to be presented is the same for both classes of bondholders, with the exception, that the bondholders of the original Greensboro Water Company, under the mortgage of 1888, claim that their lien to the property, conveyed to them under said mortgage, cannot be affected by the consequences of the acts whether contractual or tortious, of the Greensboro Water Supply Company, a corporation with which they never had any relations whatever, and which does not claim to have received any title to its property, except subject to the lien of the mortgage made for their benefit. The opinion of the Circuit Court below is in the record (page 385) entitled to, and naturally receives the utmost respect from counsel; but the errors alleged here, to which we claim to call attention, will, perhaps be best judged, by following the order of discussion in which the

points seem to arise most naturally and logically. This order we attempt to follow.

I.

THE STATE COURT HAD NO POWER TO DETERMINE THE QUESTION OF THE LIABILITY OF THESE MORTGAGE BONDHOLDERS HERE TO ANSWER OUT OF THEIR ESTATE TO THE JUDGMENT CREDITORS, BUT THE SOLE AND TOTAL RESPONSIBILITY AND JURISDICTION FOR THE DECISION OF THESE QUESTIONS IS WITH THE UNITED STATES COURT, WHICH HAD TAKEN JURISDICTION OF THE PROPERTY AND OF ALL OF THE PARTIES. MOREOVER, THE DECISION OF THE STATE COURT OF N. C., THAT A WATER COMPANY WAS LIABLE TO PROPERTY OWNERS FOR LOSSES BY FIRE, BY REASON OF THE CONTRACT BETWEEN THE WATER COMPANY AND THE CITY, AND THAT THIS LIABILITY WAS IN TORT, WAS ONLY MADE AFTER THE RIGHTS OF ALL PARTIES HAD ACCRUED.

There can, of course, be no difference of opinion that when the United States Court has taken jurisdiction of property, as in this case, by the appointment of a receiver, in a plenary proceeding to wind up the affairs of a corporation, marshal its assets, and enforce the liens in due order, and dispose of its property free and clear of all liens whatsoever, creditors are at liberty to prosecute certain claims against the corporation in the State Court. But it is for the United States Court to determine absolutely what are the liens which affect the corporation as between the parties now totally under its jurisdiction, and which it will impress and enforce upon the property or proceeds of sale in due order, without being bound by these judgments obtained against the corporation. This rule is not founded solely upon the inherent jurisdiction of every Court, to protect the subject matter and the suitors over which it has taken jurisdiction from the interference of other Courts, which can try only single or partial controversies between certain, and not all, of the litigants, a principle absolutely essential to secure justice and the effectual dispatch of the business of the Court, but also upon the con-

sideration, that the very Constitution and creation of the United States Courts originates and proceed from a different political system from that which creates State Courts, and one which, from its very nature and origin, is intended to be paramount, where any conflict of law arises, or seems to arise. Therefore, when the United States Court comes to consider and decide upon the questions which arise between the litigants, and diverse and adverse claimants of property which is under its jurisdiction, it is bound to examine all these questions afresh and upon its own responsibility, not only because certain of the litigants were not represented and hence were, in nowise bound by the proceedings in the State Court, to which they were not parties, and as to which there can be no *res adjudicata*, but also because it has its own system of interpretation of law, which it must apply, even if differing from the system by which the State Courts are bound, or which they seek to apply, except, of course, where the State Court has been engaged in the application and interpretation of its local statutes or peculiar local laws, which have the force of statutes, and even as to which exception, there are still certain exceptions. Therefore, when these respondents assert, that they have recovered certain judgments against the defendant corporation in this case, in the State Court of North Carolina, which, by the decisions of that State, are made a lien upon the property, superior to the mortgage in question, this Court is bound to say to them, that these judgments are not judgments against the mortgagees or their property, who were no parties to the judgments or actions in the State Court, until this Court has examined the records under which they were obtained, and can judge and determine for itself, under its own rules, and system of *judicature*, whether they were judgments which were proper to be rendered, which it would have rendered itself or allowed to be rendered by a Judge of the first instance, acting for this Court, and then further must determine, always and ever under its own rules and system of

laws, exactly what lien in place and order these judgments should have, if any, against the assets in the hands of the Court, and under its jurisdiction solely.

Moreover, if the State Court, in rendering this judgment, had decided that the origin of the action was a tort, or wrong, actually committed, rather than a breach of contract, and this Court should be clearly of opinion that the cause of action, *i. e.*, the fact from which it arose, was a breach of contract and depended upon that contract, and could not have arisen except by virtue of the specific rights given by the contract, it will say so, and will not be bound by the view of the State Court on that subject, because torts and contracts, and the distinction between them, and the relative rights which arise out of such distinction, are questions of general law, and this Court has its own high duty of interpretation of that law, and cannot be bound by the peculiar view of the State Court on that subject. If the place to be accorded to a judgment depends upon the question whether the cause or subject of action arose from the fact or act of a contract or tort, this Court will decide that question, and give its due place to such lien, without reference to the novel judgment of the State Court on that subject. We beg to have it carefully noted that such significance or effect can not, in our opinion, properly be claimed for the judgment or views of the State Court on this last-mentioned subject, because we think it too plain for argument that the Supreme Court of North Carolina has decided here that the fact or act upon which these actions are founded, "the causes of the action" are in their nature and origin contracts, founded upon the breaches of the contract appearing in the evidence, and not torts, but that merely the forms of action adopted by these judgment-creditors were forms of tort or action *ex delicto*, which choice of form of action could not of course change the rights of the parties.

To illustrate by the very points at issue, the respondents here, say, that the State Court decided, that where a munici-

pal corporation has power to furnish water to its citizens, either by erecting its own system of works, or by making a contract with a corporation to erect and supply water for fire protection in its place and stead, such corporation is liable in damages, if its means are inadequate to, or management negligent in, supplying such water upon the occasion of fire; is liable in damages, be it said, to any citizen or taxpayer whose property is damaged or destroyed. But the Supreme Court of the United States has said, that in such a question as this, a question purely of general commercial or corporation law, (for no statute of North Carolina purports to give any such right of action), this Court will follow its own rule on the subject, and not that newly invented for the occasion by the State Court, and that rule, of course, it will take from the decisions of the United States Courts wherever found, and from the decisions of the State Courts and of the English Courts, if concurrent on the subject, rather than from this singular novel and revolutionary opinion of the State Court.

These decisions in the State Court of North Carolina, by which the respondents claimed the United States Court below and this Court are bound, and by which the judgments of the State Court against the defendant company are made valid judgments against the petitioners, said mortgagees, and liens upon the property of the defendant company prior to the liens of said mortgagees, were both made upon the claims of these very judgment-creditors, for losses by the fires mentioned in the evidence, and long after the rights of the petitioners had accrued by virtue of the mortgages executed to them years before.

The first case was—

Gorrell vs. Greensboro Water Supply Co., 124 N. C. 328.

In that case the Supreme Court of North Carolina held contrary to the law as laid down in every other State, as we

shall see later, except Kentucky, the peculiarity of whose case has been shown to be no real exception, that a water company was liable for losses by fire arising from its neglect or failure to furnish water of adequate pressure, etc. But it said expressly: "But this is a case of first impression in this State." And it founded the right of the plaintiff to recover strictly and solely upon the contract which had been entered into between the city, of which he was a taxpayer, and the water company. We quote its very language from page 337 of said 124 N. C. report:

> "Here the Water Company contracted with the city to furnish certain quantities of water for the protection of the property of the citizens as well as of the city, and received full consideration, a large part of which comes in the shape of taxation paid annually by those citizens. *On a breach of the contract whereby the property of a citizen is destroyed, he as a beneficiary of the contract is entitled to sue, and under our code requiring the party in interest to sue, he is the only one who can.*"

Then came the case of Fisher vs. Greensboro Water Supply Company, 128 N. C. 375, which is incorporated in this Record, pages 259 to 385, on appeal, page 239 to 243. We quote the exact language in that case:

> "There is but one question presented. Was the plaintiff entitled to judgment *ex contractu* or *ex delicto*, which depends solely upon the nature of the action AS BROUGHT, whether for breach of contract or for negligent injuries?"

And further the following are the issues submitted to the jury and their findings:

1. "At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the city of Greensboro, a supply of water, according to the plans and specifications contained in the agreement and con-

tract, as set out and described in the complaint, in the quantity and for the purposes set out? Answer, yes."

2. "At such time was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same, during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer, yes."

3. "Did the defendant company fail to comply with its contract? A. Yes."

4. "Was the plaintiff injured by the negligence of the defendant? A. Yes."

Upon said verdict the plaintiff moved for a judgment for the tortious injury and damage done him by the negligence of the defendant, which was refused by his Honor, who entered judgment for damage as upon breach of contract, to which plaintiff excepted and appealed.

"We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and the consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action and the plaintiff so declared. He stated the facts out of which the legal obligation arose fully, and also the obligation itself, and the breach of it and the damage resulting from that breach, etc."

Now whatever the above may mean, it must mean only that the Court decided that the form of action adopted by the plaintiff in his proceedings was an action in tort, and consequently, that the form of the judgment ought to be also entered in tort, for it nowise overrules or modifies its decision in Gorrell vs. Water Company, 124 N. C., quoted above, in which it is said that the right of action arose strictly

and solely by reason of the contract between the city and this water company, to which the plaintiff, whose property had been destroyed by fire, was privy, in such sense that he was entitled to sue upon the contract, as could the city itself. For it went on to add:

> "The defendant in this action is an incorporated company, and the plaintiff insists that under section 1255 of the Code, an execution issued upon a judgment founded on an action for tort has superior advantages in its enforcement over executions issued upon judgments founded in contract. As to this, however, we do not express an opinion, as that question is not before us."

Fisher vs. Greensboro Water Supply Co., 128 N. C. pages 379, 380.

Is it less than fair to the North Carolina Supreme Court therefore, than to infer that when it was informed, as the report of the case shows, that it was informed that the object of procuring the entry of the judgment in Fisher's case, in the form as of tort rather than contract, was to obtain a consequent lien on the property in these proceedings, that it clearly disclaimed the propriety or the right so to do?

II.

THE FEDERAL CASES UNIFORMLY AND CONSISTENTLY HOLD THAT JUDGMENTS IN STATE COURTS AGAINST CORPORATIONS OF WHICH THE UNITED STATES COURTS FOR SUFFICIENT CAUSE HAVE TAKEN JURISDICTION FOR THE PURPOSE OF SELLING THEIR PROPERTY AND DISTRIBUTING THE PROCEEDS AND ASCERTAINING ALL LIENS IN THEIR DUE ORDER, ETC., HAVE NO VALIDITY AGAINST MORTGAGEES OF SUCH CORPORATIONS, WHO HAVE PROPERLY INVOKED OR OBTAINED THE JURISDICTION OF THE UNITED STATES COURT, UNLESS SUCH UNITED STATES COURT, ON EXAMINATION OF THE FACTS UPON WHICH SUCH JUDGMENTS WERE OBTAINED, ITSELF, AND FOR ITSELF, PRONOUNCES SUCH JUDGMENT VALID, AND AWARDS AND ENFORCES SUCH CLAIM.

We quote from the opinion of the Supreme Court of the United States, in a case which is apparently parallel with this, viz:

Brooks *et al.* vs. Burlington R. R. *et al.*, 101 U. S. 443:

> "O'Hara and Company and Wells, French and Company had both commenced legal proceedings in the proper Courts of the State to establish their liens before the present foreclosure suit was begun by appellants, and that in those Courts *after a contest with the railway company*, judgments were rendered establishing their liens, and it was after this that they were made defendants to the present foreclosure suit. To these proceedings, Barnes the principal contractor and the railway company were parties, and we take it for granted that as against them the judgment of the State Court establishes the validity of the lien. The appellants being no parties to these proceedings are not bound by that judgment, and both the validity of the lien as against them and whether the lien if valid, is paramount to that of the mortgage, are the questions for consideration here. These questions must be determined by the Statutes of Iowa as construed with regard to the facts of this case."

The Supreme Court has further said that these judgments in the State Courts when proved in the Courts of the United States, are in kind foreign judgments, and if they are found to be rendered for causes that would be regarded as invalid causes of action in the United States Courts or for a *cause of action*, as for instance to recover a penalty which cannot be enforced outside of the State itself, whose statutes proclaim the penalty, they will not be reaffirmed as judgments in the United States Courts, and no execution will be enforced upon them. We use the language of Mr. Justice Story quoted by Justice Gray in stating the decision in the United States Court:

"It, the Constitution, did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments *without a new suit in the tribunals of other States.* And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments."

Wisconsin vs. Pelican, 127 U. S. 292.

Now we quote Judge Taft, speaking for the United States Court of Appeals of the Sixth Circuit:

"It is said, however, that Wilson has recovered a judgment against the Railroad Company as principal contractor, to the full amount of his claim. That is true, and though the judgment was rendered by default, *there was no fraud in procuring it*, and it is therefore conclusive *upon the Railroad Company.* The judgment is not, however, evidence *of any indebtedness against the R. R. Co. such as* to give Wilson's claim priority of lien over the bonds in a controversy with the bondholders. This is settled by the case of Hassall vs. Wilcox, 130 U. S. 493."

Central Trust Co. vs. Condon, 67 F., page 103.

"It therefore follows from Hassal vs. Wilcox, that Wilson's judgment against the Railroad Company, to which the Central Trust Company was not a party, does not bar the Trust Company as mortgagee and trustee for the bondholders from contesting the validity of this claim against the Railroad Company, etc., etc."

Central Trust Co. vs. Condon, 67 F., page 104.

We quote the Court of Appeals of Sixth Circuit briefly:

"The proposition that a judgment or decree is binding only on the parties thereto, is *elementary* and there is nothing in the relations between the Railway Company and the trustee and the mortgagee and bondholders which creates an exception to this rule, etc. The case cannot be distinguished from Hassal vs. Wilcox, 130 U. S. 493, in which it was held that the bondholders were not bound in a judgment in the suit in which they were not made parties, and this case was followed and applied by this Court in

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296.

Trust Company vs. Condon, 67 Fed. 84, and Same vs. Bridges, 57 Fed. 753.

"It was consequently the duty of the Court below to consider and determine for itself the question of the petitioner's right to recover, as well as the amount of such recovery, in case *the question of the petitioner's right to recover* was decided in her favor. Both questions were raised by the answer to the petition *and should have been examined and determined by the Court below independently of the adjudication of the State Court.*"

Central Trust Co. vs. Hennen, 90 F. 595.

And we quote the Supreme Court of the United States again in the case which is regarded as leading on this subject:

"And although Wilcox brought the suit and obtained his judgment in the State Court prior to the filing of the present bill, we do not think it could be held that the trustee under the mortgage or the bondholders were bound by that judgment rendered in a suit to which they were not parties. Although they had a right to intervene in that suit they were not obliged to do so, nor was Wright obliged to prosecute the suit which he brought in the State Court. They had a right to come

into the Circuit Court of the United States to contest the priority of lien, and as his claim originated after the mortgage was made, *compel him to prove affirmatively the existence and priority of his lien under the statute of Texas.* He undertook to do so, but the master reported that he found, from the evidence, that the note on which the judgment was predicated included amounts not secured by a lien under the Act of 1879, as well as amounts for which a lien was given under that Act, and that Wilcox had no lien prior to the first mortgage bondholders."

Hassall vs. Wilcox, 130 U. S. 503.

III.

AND IN DECIDING THE QUESTION AS TO THE VALIDITY OR NATURE OF THE CAUSE OF ACTION UPON WHICH THE JUDGMENTS WERE RECOVERED IN THE STATE COURT BY THE INTERVENORS, RESPONDENTS HERE, NEITHER THE COURT BELOW NOR ANY UNITED STATES COURT COULD ACCEPT THE DECISION OF THE STATE COURT OF NORTH CAROLINA, IN THESE PROCEEDINGS, BECAUSE THE QUESTIONS ARE QUESTIONS OF GENERAL JURISPRUDENCE WHICH A UNITED STATES COURT MUST DECIDE FOR ITSELF.

An excellent statement of this rule which has been frequently enunciated by the United States Court has been made by Mr. Justice B. R. Curtis :

> "On questions of commercial law and general jurisprudence, the Courts of the United States do not hold themselves bound by the Courts of the States, where they are trying cases, that do not belong any more to the jurisprudence of that particular State than they do to the jurisprudence of any other State."
>
> See—Curtis' Jurisprudence of the U. S. Courts, 234.

We quote from a few of the leading cases on that subject in this Court :

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction in the administration of State laws co-ordinate with and not subordinate to that of the State Courts, and are bound to use their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case although a different interpretation may be adopted by the State Courts after such rights have accrued."

Burgess vs. Seligman, 107 U. S. page 33.

"But admitting the doctrine to be fully settled in New York, it remains to be considered, where it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that the Courts of New York did not found their decision upon this point, upon any local statute or positive, fixed or ancient local usage; but they deduce it from the general principles of commercial law. It is, however, contended, that the 34th section of the Judiciary Act of 1789, chapter 20, furnishes a rule obligatory upon this Court to follow the decisions of the State tribunals in all cases to which they apply. That section provides, 'that the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law

in the Courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section, includes within the scope of its meaning, the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. * * * And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes, and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof should be sought, not in the decisions of the local tribunals, but in the general principles and doctrine of commercial jurisprudence."

Swift vs. Tyson, 16 Peters, 18, from opinion of Mr. Justice Story.

See also—Rowan et al. vs. Runnels, 5th Howard U. S. 134, per C. J. Taney.

Liverpool Steamship Co. vs. Steamers Ins. Co., 129 U. S. 397.

B. & O. R. R. vs. Baugh, 149 U. S. 368.

Venice vs. Murdock, 92 U. S. 494.

R. R. Co. vs. Lockwood, 17 Wallace 357.

R. R. Co. vs. National Bank, 102 U. S. 14.

U. S. vs. Peters, 5 Cranch, 115.

This last case, probably the earliest on the subject, was one wherein the Legislature of the State of Pennsylvania, by Act passed, attempted to determine titles and interests under and against a judgment of the United States District Court, and the decision was delivered by Chief Justice Marshall, who used the following language:

"If the ultimate right to determine the jurisdiction of the Courts of the Union, is placed by the constitu-

tion in the several State Legislatures, then this Act concludes the subject ; but if that power necessarily resides in the Supreme judicial tribunal of the nation, then the jurisdiction of the District Court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined ; and, the Act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question."

It may be added, that a Court of Pennsylvania or North Carolina, laying down a new rule of law, after the rights of all the parties hereto had accrued, and even after the jurisdiction of this Court had attached to the subject matter, with whatever respect it may be considered, cannot be permitted to prejudice the question which had been laid before this Court for its examination, any more than could the Legislature of such State.

We quote further from this Court :

"There are, it is true, many *dicta* to be found in our decisions averring that the Courts of the United States are bound by the decisions of the State Courts on the construction of their own laws. But although this may be a correct, yet a rather strong, expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it, etc., etc. When the decisions of a State Court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions, and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedents. *Cases may exist, also, when a cause is got up in a State Court for the very purpose of anticipating our decision of a question known to be pending in this*

Court, etc., etc. Parties who, by the Constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the Court. The theory upon which jurisdiction is conferred upon the Courts of the United States in controversies between citizens of different States, has its foundation in the supposition that, possibly, the State tribunals might not be impartial between their own citizens foreigners."

Pease vs. Peck (8 How), 59 U. S. 600.

We add another recent case in this Court in which instructions were sent to Circuit Court of Appeals of the 4th Circuit and where the question was the validity of certain township bonds which had been decided to be invalid by the State Court of South Carolina. This Court determined the opposite, and quoted from Burgess vs. Seligman, above referred to, as follows:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudice and sectional views, it would be a dereliction of their duty not to exercise an independent judgment of cases not foreclosed by previous adjudication."

"*There not being shown to have been a single decision of the State Court against the constitutionality of the Act of* 1885, *before the plaintiff purchased his bonds*, etc., etc., the question of the validity of these bonds must be determined by this Court according to its own view of the law of South Carolina."

Folsom vs. Township Ninety-Six, 159 U. S. pages 626, 627.

IV.

THE SIMPLE AND SINGLE QUESTION PRESENTED BY THIS RECORD THEN IN THE LIGHT OF THE FOREGOING AUTHORITIES IS, WHAT WAS THE DECISION OBLIGATORY UPON THE UNITED STATES COURT BELOW AND THIS COURT, AFTER THESE FIRES HAD TAKEN PLACE AND PRIOR TO THE DECISION OF THE CASE ARISING OUT OF ONE OF THEM, IN GORRELL VS. WATER COMPANY, 124, N. C.? CERTAINLY THERE COULD HAVE BEEN NONE OTHER, THAN THAT THIS DEFENDANT WATER COMPANY WAS NOT LIABLE FOR LOSSES CAUSED BY THESE FIRES, EITHER IN CONTRACT OR IN TORT. IF THIS BE TRUE, GORRELL VS. WATER CO. AND FISHER VS. WATER CO. DECIDED AFTER THE RIGHTS OF ALL PARTIES HAD ACCRUED, CANNOT CHANGE THE LAW OF THE U. S. COURTS.

The test of the law of this case here, is what this Court would necessarily have found the law to be, if Gorrell vs. Water Company and Fisher vs. Water Company, had never existed, to be cited. For they certainly did not exist at the time the contracts and transactions were entered into and the rights of the parties here litigating had accrued. We have only to consider the dates of the two mortgages, January 10, 1888 (see Record, Exhibit C, page 421), July 1, 1896 (see Record, Exhibit G, page 121), the dates of the fires, 1897, 1899, and the date of the Gorrell vs. Water Co. decision, 1901 (see 124 N. C., page), and the date of the Fisher vs. Water Co. decision, 1901 (see 128 N. C., page), and under the above rules there could be but one statement of the law for this Court.

See also—Lake Shore, etc., R. R. vs. Prentice, 147 U. S. 101.
Knox County vs. Ninth Nat'l Bank of N. Y., 147 U. S. 92.

V.

IF THERE BE A DIFFERENCE BETWEEN THE CASES IN THIS FOURTH CIRCUIT AND THOSE IN THE OTHER CIRCUIT COURTS OF APPEALS AND IN THE SUPREME COURT OF THE UNITED STATES, WITH RESPECT TO THE DUTY OF THE UNITED STATES

COURT TO ADJUDICATE, FOR ITSELF, THE VALIDITY OF THE CLAIMS OF THE APPELLEES AND THEIR RIGHT TO A LIEN, IT IS IMPORTANT THAT SUCH DIFFERENCE SHOULD BE OBLITERATED ONCE AND FOR ALL.

It was claimed by the respondents below, that the rule in this Fourth Circuit was different from the rule in other circuits of the United States, and that a judgment in a State Court herein was given an effect which was denied, when presented in the United States Courts, in the other circuits. Of course, this ought not to be, and it hardly can be. It is perfectly true, that in two cases in this circuit, (Southern R. R. Co. vs. Bouknight, 70 Fed. R. 442 and Central Trust vs. C. C. & A. R. R. 65 Fed. R. 262) the Court of the Fourth Circuit used language which apparently gave the judgment in the State Court, at least, a *prima facie* validity as against the mortgagee, when it was produced in the United States Court for the first time, which hardly seems to harmonize with the language of the Supreme Court and of the United States Courts in the other circuits, before quoted. But such language was used only with respect to the circumstances of the particular cases, after the records had been examined, and the Court had presumably passed upon the facts and circumstances of the action set out in the record, and itself adjudged that they constituted valid causes of action which entitled them to certain liens. Certainly the Circuit Court in this circuit has promulgated the doctrine in language which, if its due significance is awarded to it, hardly differs from the language of the Supreme Court.

We quote as follows from the last case:

> "When in marshaling the assets of this insolvent Railroad Company the mortgage creditors and those claiming through them are met by the judgment and its claim to priority, they have the right to examine it, *to look into the cause of action*, to ascertain when and where the action was brought, *to know if the conditions of law*

existing when their mortgage was executed have all been complied with."

Bearing in mind that this is the language of the Judge whose decision is before us here, and which has caused the doubt and uncertainty in the minds of the Circuit Court of Appeals below, which they have asked this Court to dispel by its superior light, we merely remark, that if this language is incomplete or incommensurate with the rule laid down by this Court on the subject, and clearly understood and accepted in all other circuits, yet it would be all sufficient, if practically followed, to determine the invalidity and inferiority in lien of these judgments presented here. For when the Court below, under the instructions of this Court, "*looks into the cause of action*" set out in these judgment rolls, and "*examines*" it in the light of the principles of its own law upon this subject, without being bound by the decisions of the North Carolina Court, announced for the very first time, in rendering these very judgments, it will be bound to say, that the cause of action was not a lawful one, that it was one which has never before been allowed to be maintained against a water supply company having the chartered rights and operating under contracts identical with the one in question here, and further, that if it were to be allowed to be maintained at all, it could only be, as the State North Carolina decided in Gorrell's case in 124 N. C., where it was decided that the only possible right to maintain the action was by counting upon the contract, to which the Court said these judgment creditors, the intervenors here, were parties by substitution and as privies to the City of Greensboro, which had made the contract for their benefit with the defendant water company.

But prior to the certifying of the questions which have been sent to this Court, the Circuit Court of Appeals of the Fourth Circuit, had clearly righted itself on this subject, and fallen into line with all other Circuit Courts of Appeal of

the United States, headed by the Supreme Court itself. This it had done in the case of—

Julian vs. Cent. Trust Co., 115 Fed. R. 956.

Affirmed by this Court in 193 U. S. 93.

That case was exactly similar to the present, where a judgment obtained against the Western North Carolina R. R. Co. was claimed to be prior to the mortgage made to the Central Trust Company, and such claim was rested upon the judgment and decision of the Supreme Court of North Carolina, in the case of—

James vs. Western N. C. R. R. Co., 121 N. C. 523,

cited by our opponents as authority in this case.

We quote from it as follows:

> "This decision of the highest Court of the State was made after the rights of the Southern Railroad Company, whatever they may be, had accrued in the property and franchises of the Western North Carolina Railroad Company, and while entitled to the highest respect and consideration, is not conclusive upon this Court in determining the rights secured to the purchaser under the decree of foreclosure in the Federal Court. Burgess vs. Seligman, 107 U. S. 20. Nor can we see any room for the application of Section 1255 of the North Carolina Code, making liens for judgments for torts superior to mortgages of incorporated companies. In this case the tort was committed after the judgement debtor had parted with all its property and there was nothing for such judgment to operate upon."
>
> "In the case in hand the property and franchises have been sold, and there is no contractual relation between the companies nor permissive operation of the road by the new company."

Julian vs. Central Trust Co., 193 U. S. pages 103-109.

Therefore, it is plain, that even if this were a judgment *for* a tort committed by the Greensboro Water Supply Company, there is nothing for such judgments to operate upon, except such title as the Greensboro Water Supply Company received, when the property was sold to it, subject to the lien of the Guarantee Trust and Safe Deposit Company, the first mortgagee herein mentioned. It had no contractual relations whatever with such mortgagee, nor was there any permissive operation of the property by it, inasmuch as the mortgage had never been in default, up to the time the receiver was appointed in this case, or up to the time when these fires occurred, so there could not be any operation by the permission of the mortgagee, who has alleged without contradiction in this cause, that it had no knowledge of the sale to, or operation of this property by the defendent water company, whatever knowledge certain casual and one time holders of the bonds may have had, who were, however, never in any better position to interfere with or give permission for the operation of the property, by the defendant company.

We cite, however, one recent case in this Fourth Circuit, showing that the Courts therein had light of their own to go by.

Bancroft vs. Wicomico, 121 F. R. page 375.
Affirmed, 135 F. R. page 977.

We quote Judge Morris, whose language was affirmed in similar words.

> "A question as to the liability of a railway company determined in suit to which the company was a party, is not *res adjudicata* against a mortgage bondholder of the company when no one claiming under the mortgage was a party."

Said Judge Pritchard:

> "The Court in dealing with this question was not bound to follow the rule of construction adopted by the State Court, etc."

In fact the present Chief Justice of this Court had already instructed this Fourth Circuit, in language that ought to have been decisive of this case, by quoting from Mr. Justice Matthews in Covell vs. Heyman, 111 U. S. 176, as follows:

> "The forbearance of Courts of co-ordinate jurisdiction, *administered under a single system*, exercised towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; *but between State Courts and those of the United States, it is something more. It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or mere convenience.* These Courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."
>
> *Ex parte* Tyler, 149 U. S. page 187.

VI.

THE DOCTRINE OF U. S. COURTS AND OF ALL THE STATE COURTS, WITH ONE EXCEPTION, AND OF THE ENGLISH COURTS IN RESPECT TO THE CAUSES OF ACTION ASSERTED BY THESE INTERVENORS, THE RESPONDENTS HERE, AGAINST THE DEFENDANT, THE GREENSBORO WATER SUPPLY COMPANY, SUPPLYING WATER UNDER

ORDINANCE OR CONTRACT TO THE CITY, IS THAT SUCH COMPANY IS NOT LIABLE FOR ITS FAILURE TO FURNISH ADEQUATE AND PROPER SUPPLY TO A CITIZEN NOT HAVING A DIRECT CONTRACT WITH THE COMPANY ITSELF, FOR DAMAGE TO HIS PROPERTY, WHETHER THE SUIT BE FOUNDED ON CONTRACT OR TORT.

Under the authorities already quoted, therefore, it was the duty of the United States Court below, when this judgment rolls showing the judgment of Fisher and others, recovered against the defendant Water Company, were presented as the exhibit or evidence of the claims of these respondents to a lien and a prior lien upon the property in the hands of the United States Circuit Court, to have examined for itself into this cause of action, in order to determine its nature, and whether it was a valid cause of action, such as the United States Court would entertain against the defendant and the mortgagees claiming from the defendant, if their liens were to be relatively placed or displaced by this claim. In so doing, according to the cases which are consistent on the subject, it was bound to inquire what was the law of the land respecting such a cause of action at the time the mortgages to the petitioners here, had been made, viz. : in 1888 and 1896, prior to the happening of these fires, and the decision of the North Carolina Court upon the cases growing out of these fires. If it had done so, there could have been but one result, as the following cases show, for only in Kentucky, in the case of the Paducah Lumber Co. vs. Paducah Water Supply Co., 89 Ky. 340, was there a single decision of any Court, that such a claim as is set out in these judgment rolls could be the basis of any recovery at all. That excepted case, as has been pointed out in the criticisms about it, was no real exception. For there the plaintiff had a direct contract with the Water Supply Company, calling for specific service, which was specifically broken, and did not have to depend upon a contract made between the water company and the city for its benefit,

although the Court in that case did not rest its decision upon this ground.

The current of decisions on this subject has been recently summed up by Judge Ricks, of the Sixth U. S. Circuit, in a most learned opinion, as follows, in Boston S. & D. Co. vs. Salem Water Co., 94 F. 240, a case identical with the case at bar:

> "That this action is not founded upon any common law duty and does not therefore sound in tort, is quite evident; that it is not based upon a contractual relation between the parties has been, with one exception, uniformly held in every jurisdiction within the United States, where the question has arisen. (Davis vs. Water Co., etc.) * * * The general doctrine held by the foregoing cases, is that, where a city contracts with a Water Company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the Water Company as will authorize such resident or citizen to maintain an action against said Water Company for the injury or destruction of his property by fire caused by the failure of the Water Company to fulfill its contract, *and this is held even where the ordinance granting the Water Company its franchise provides that the Water Company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the Water Company to furnish sufficient amount of water to put out fires.*"
>
> See—Mott vs. Mfg. Co., and other cases cited *supra.*

The only case in all the books where the Water Company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of Paducah Lumber Company vs. Paducah Water Supply

Company, 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, in which case it was unnecessary for the Court to have held this doctrine, as there was a private contract between the Water Company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticised by the Courts of the various States in which this question has been decided. * * * That a city owning its own water works cannot be held liable for failure to furnish sufficient water supply to extinguish fires is undisputed.

2d Dillon, Mun. Cor., 975, etc., etc."

"If the city itself cannot be held liable for damage resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of contract between the Water Company operating under a franchise from the city, and the citizens or residents of such city, it is clear upon principle, as well as authority, that no legal obligation exists on the part of such Water Company and in favor of the individual citizen to maintain a sufficient pressure at the city water mains to extinguish fires which may occur upon the premises of such individual citizen, * * * there was no contract between the intervening petitioner and the Company, or the city, that in case of fire he should be reimbursed for any loss he might sustain."

All the above is from—

Boston Safe Deposit and Trust Co. vs. Salem Water Co., 94 F. 240-1.

The last sentence quoted from this case is exactly the condition here. The respondents here do not allege that they had any contract with the defendant Water Company except the contract set out in the ordinance granting the franchise to the Water Company, but they allege that they were privies to

that contract, and the Supreme Court of North Carolina decided that they were, and that their sole right of action accrued to this citizen by virtue of that contract as if made directly with it. Said the Court :

> "On a breach of contract whereby the property of the citizen is destroyed, he, as a beneficiary of the contract, is entitled to sue." * * * "And whether there was a breach of the contract and whether it was the proximate cause of the loss, regarded as matters of fact, will be determined by the jury,"
>
> See—Gorrell vs. Water Co., 124 N. C. 337.

The North Carolina Court itself acknowledges :

> "It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of the taxpayers from fire unless made liable by express statutory provision."
>
> Gorrell vs. Water Co., 124 N. C. 336.

But it should be observed, that as the United States Court in Massachusetts, quoted above says, the reason that the city itself cannot be held liable is the reason why the Water Company, to which it has delegated its powers under the statutory authority either to exercise the power in person or to exercise it by contracting with a supply company, cannot be held liable to a private citizen. The existence of the power is always defined as a governmental or public one and the remedy for it is by the action of the corporation itself or its members, for of course, in the case of the municipal corporation, its officers can be punished or removed either immediately or at stated periods for nonfeasance or misfeasance, and in the case of the grantee of the franchise, the penalties and forfeitures, express or implied in the contract, can be invoked by the municipal corporation or the city for the benefit of its citizens, and these remedies are from their very nature exclusive of any others.

And it is also to be noted that the argument, that property owners dependent upon a private water company have not even this remedy, of turning out the management or officials of the company, as city officials and administrations can be turned out, if the management is deficient, is not a sound one, because the city is still responsible to them, whether the city owns its water company or operates it under a contract, and in this very case, there was a provision for terminating the contract for forfeiture, and in fact this was always within the power of the city. But as the Court in the case of Nichols vs. Huntington Water Co., 44 S. E. Rep. 292, quoted hereafter, says:

> "The property owner has the same right against the city as he has against the private water company performing the same service as agent of the city. No more, no less."

And in truth, in modern times, it must be remembered, that the real protection of the property owner is the insurance of his property, which can be thus obtained at the most economical cost to him and the community, and to make the city or the water company an insurer in this way, which would be the real consequence of allowing such liability, would be to bankrupt either corporation, the municipal one or its agent, the private water company.

The English doctrine rests the exemption from suit by the taxpayer on this very ground that the language of the act granting the franchise "imposed the penalty for the breach of the duty in question." This case was decided in the Court of Appeal, and the opinion delivered by Lord Cairns, the Chancellor, and its doctrines has never since been questioned in England, or in this country, except by the Kentucky case, above quoted, up to the time that this record arose.

See Atkinson vs. New Castle Water Works Co., 2nd Exchequer, page 445.

Now the contract here between the city and the Water Company, as it is called, is set out with the master's report (page 107) and section 3, provides "that if there shall be any failure by the grantees aforesaid in regard to the supply of the water or the quality or quantity thereof, such disagreement or controversy shall be committed to arbitration and a failure to perform such award in a reasonable time by the aforesaid grantees shall work a forfeiture of its rights under the ordinance. (Record, page 108). Again, section 15 (Record, page 112) provides "a penalty of $2 per day for every day that the hydrants may be out of order." This answers conclusively the reasoning of the Court in the Gorrell case that there was no remedy unless the Water Company was made liable to a suit upon its contract with the city by a citizen, for it shows, that the completest remedy even to a forfeiture of the whole property of the defendant company was provided, and if the municipality in the exercise of the legislative power granted it, agreed upon this remedy as the most effective for its purposes, it seems impossible, that a Court should invent some other than that upon which the contracting powers, the City and its grantee, had agreed, and that for reasons of public policy, when surely it must be considered, that the State itself is the best judge of its best policy in enforcing a contract of this nature. The above is the doctrine of the United States Courts and of the English Courts on this question.

We quote briefly from the cases decided in the State Courts which have been uniform with the exception of the Kentucky case above mentioned:

> "One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests and are entitled to all rights secured by the contract. * * * It cannot be claimed, that the agents or officers of the city employed by the

municipal government to supply water, etc., are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city and responsible alone to the city. The people must allow the municipal government to enforce the discharge of duties and obligations of the officers and agents of that government."

Davis vs. Clinton Water Works Co.,54 Iowa, 60-61.

And the United States Supreme Court cited in the very case which the Supreme Court of North Carolina relied on, viz: Coy vs. Indianapolis Water Co. uses the following language:

"But whether such contracts should be made or not is exclusively for the consideration of the State. It is an exercise of an undoubted power of sovereignty, &c." (Page 670.) And on page 671: "The grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose to establish and enforce regulations, &c., which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, &c."

Gas Co. vs. Louisiana Co., 115 U. S. 651.

The following are the authorities which we repeat are more uniform and consistent in the enunciation of this doctrine than any other doctrine that can be mentioned, however generally accepted:

Vrooman vs. Turner, 69 N. Y. 480.

Becker vs. Water Works Co., 79 Iowa, 419; 44 N. W. 694.

Britton vs. Water Works Co., 81 Wisconsin, 48; 51 N. W. 84.

Hayes vs. City of Oshkosh, 33 Wisconsin, 314.
Nickerson vs Hydraulic Co., 46 Conn. 24.
Eaton vs. Water Co., 37 Neb. 546; 56 N. W. 201.
Beck vs. Water Works Co., 11 Atl. 300; (Pa. Supreme Court).
Stone vs. Water Co., 4 Pa. Dist. Rep. 431.
Phoenix Ins. Co. vs. Trenton Water Co., 42 Missouri, (App.) 118.
Howsmon vs. Water Co., 119 Missouri, 304, and note; 24 S. W. 784.
Fitch vs. Water Co., (Ind. sup.) 37 N. E. 982.
Foster vs. Water Co., 3 Lea, 42.
Ferris vs. Water Co., 16 Neb. 44.
Fowler vs. Water Co., 83 Ga. 219; 9 S. E. 673.
Mott vs. Manufacturing Co., 48 Kan. 12; 28 Pac. 989.
Bush vs. Water Co. (Idaho), 43 Pac. 69.
Wainwright vs. Water Co., 78 Hun. 146; 28 N. W. 987.
House vs. Water Co. (Tex. sup.) 31 S. W. 179.
Waterworks Co. vs. Brownless, 10 Ohio, 620.
Wheeler vs. Cincinnati, 19 Ohio, 19.
Taintor vs. City of Worcester, 123 Mass. 311.
Van Horn vs. City of Des Moines, 63 Iowa, 447; 19 N. W. 293.
Howard vs. San Francisco, 51 Cal. 52.
Black vs. City of Columbia, 19 S. C. 412.
Mendel vs. Wheeling, 28 W. Va. 262.
2d Dillon on Mun. Cor., paragraph 976, note, 4th edition.
Allen & Currey Mfg. Co. vs. Shreveport Water Works Co., 113 La. 1091; 37 So. 980.
Blunk vs. Denison Water Supply Co., 71 Ohio St. 250; 73 N. E. 210.

Almost at the very time while this case was being re-argued at Richmond at the May Term, 1903, a decision was handed down, reviewing fully the subject of our argument, by the Supreme Court of West Virginia, distinctly repudiating the North Carlina decisions in the Fisher and Gorrell cases, and that of the Circuit Court below in this record.

The case is entitled Nichol vs. Huntington Water Company, 44 S. E. R. page 292, and we quote as follows:

> "This Court has approved it as sound law. It holds that a municipal corporation is not bound to furnished protection from fire, and that when authorized so to do by legislative act, it has discretion to omit the exercise of that power *and there is no duty resting upon it* which may form the basis of a contract between the corporation and the citizen who owns property. This is the position taken by the great majority of the Courts that have passed upon the question."
>
> "This principle governs also the relation of a private or *quasi* public corporation, towards the citizen and property owners, of the city, in which, under a contract with the city, it undertakes to furnish water for protection against fire in consideration of the payment by the city of an annual rent."
>
> "An effort has been made here as in many cases to maintain this suit on the ground that the contract made between the city and the Water company, contains a promise or a contract made for the benefit of the plaintiff. Practically *all* the Courts hold the contrary of this proposition."
>
> "Two cases referred to in the brief for defendant in error assert a doctrine contrary to that enunciated in the cases hereinbefore referred to. They are Paducah Lumber Company vs. Paducah Water Supply Company, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, and Gorrell vs. Greensboro Water

Supply Company, (N. C.), 32 S. E. 720, 46 L. R. A, 513, 70 Am. St. Rep. 589. The Kentucky case has been disapproved in Mott vs. Water Company, 46 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; Fitch vs. Water Company, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; Howsmon vs. Water Company, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; Britton vs. Water Company, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; Safety Deposit Company vs. Water Company, (C. C.), 94 Fed. 238. The North Carolina case, Gorrell vs. Water Supply Company, admits that the Kentucky case is against the weight of authority, but approves and follows it on the ground that—'if, then, neither the taxpayer himself nor the city on his behalf can sue the Company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damages for which there is no redress.'"

This language is quoted from a note by Judge Freeman in 29 Am. St. Rep. 863.

The opinion then proceeds thus:

> "This is a complete *reductio ad absurdum*, and we prefer not to concur in cases, however numerous—there are probably a dozen scattered through half a dozen States,—which lead to such conclusion."

The answer to this is that, although the property owner has not a right of action against the waterworks company for his damage, he is in no worse condition than he would be, if the protection of his property were intrusted to the city, exercising its police power itself, and not through a waterworks company as an agent or instrumentality in its hands. Why should a citizen recover his damages from a waterworks company when the Courts universally hold that he cannot recover from the city itself? Nor does it follow

from this, that the protection from danger by fire is less, when it is entrusted to a private corporation, than when it is retained by the city, since the city has almost as ample power to compel the waterworks company to perform its full duty in the premises, as it has in the case of its own agents in charge of its own waterworks.

In either case the property owner must sometimes suffer an account of the negligence of the agent, whether he acts under a mere appointment, or a contract in the form of an ordinance.

It is to be noted also, that the chief justice and one of the judges of the North Carolina Court dissented in that case.

From the foregoing it is very clear, that no recovery can be had upon the contract between the city and the waterworks company. Nor can a different conclusion be reached by applying the principles governing actions *ex delicto*.

In Fowler vs. Water Works Co., 85 Ga. 219, 9 S. E. 673, 29 Am. St. Rep. 313, the Court says:

> "There being no ground for recovery treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto?* We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. Wright vs. Augusta, 78 Ga. (6 Am. St. Rep. 236-256) Am. & Eng. Ency. of Law, Vol. 7, page 997, *et seq.*

We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command

by statute or express law. To the same effect are Fitch vs. Water Co., 139 Ind. 214, 34 N. E. 982, 47 Am. St. Rep. 258; Howsmon vs. Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654."

The whole of the above is a quotation from Nichols vs. Huntington Water Company.

Still another case on this subject has been decided since the decision of the North Carolina Court, and the decision of Judge Simonton in this Record, adopting the decisions of the North Carolina Court, which is cited to the Court, viz:

Wilkinson vs. Water & Light Co. 78 Miss. 389
28 So. 877.

We quote briefly therefrom:

"It is contended by the appellant that the water company is a public corporation of this State and not a mere aid or arm to the municipality of Jackson, exercising a governmental function, that it is a corporation for gain engaged in public business and charged with obligations and duties to the public, that the contract with the city was made for his benefit and for the benefit of the other inhabitants and citizens of the city, in consideration of the special tax he and they had to pay by reason of the contract, and also by reason of the acceptance of the valuable franchise conferred by its charter, and these considerations raise a public duty on the part of the water company to the public, etc., etc. We fully recognize the rule of law as to privity of contract invoked by counsel for appellee, as also the exception contended for by counsel for the appellant, that a person not a party to the contract may maintain an action thereon, etc., etc. In this case, however, we are clearly of opinion, that the contract before us imposes no public duty on the part of the water company to a citizen or inhabitant for the non-performance of which an action

of tort can be maintained, and that the contract does not show in express terms or by fair intendment that it was made for the benefit of the citizens or inhabitants in the sense that would enable him to maintain an action thereon."

Wilkinson vs. Water Co., 78 Miss. page 401.

Is it less than accurate to sum up this examination of authorities before and since the decisions of the State Court of North Carolina, given in evidence as the authority for their claim, by these respondents here, by the remark that they have created scarce a ripple of dissent in the uninterrupted current of decisions on this subject?

VII.

TORTS AND CONTRACTS AND THE BREACHES THEREOF AND THE DISTINCTION BETWEEN THEM AND DEFINITIONS THEREOF ARE CERTAINLY PART OF THE SYSTEM OF GENERAL JURISPRUDENCE OF THIS LAND, AND AS SUCH MUST BE DEFINED AND DETERMINED BY THIS COURT AND THE U. S. COURTS BELOW IT, INDEPENDENTLY OF STATE COURTS AND THEIR CHANGING OR NOVEL DECISIONS, THE PRODUCT OF THEIR RESPECTIVE LOCAL INFLUENCES. THEREFORE THE WRONGS COMPLAINED OF BY THE RESPONDENTS IN THEIR CAUSES OF ACTION SET OUT IN THEIR JUDGMENTS, UPON WHICH THEY INTERVENE HEREIN, ARE NOT WRONGS INDEPENDENT OF CONTRACT, ARE NOT WRONGS THAT CAN BE DEFINED AS SUCH, WITHOUT THE ALLEGATION OF THE PARTICULAR STIPULATIONS OF THE CONTRACT, AND SO ARE NOT TORTS, WITHIN THE GENERALLY UNDERSTOOD MEANING OF THAT WORD, WHICH IS PLAINLY THE MEANING ATTACHED TO IT IN SEC. 1255 OF THE CODE OF NORTH CAROLINA. NOR ARE THE ACTIONS MAINTAINABLE LAWFULLY UPON THE THEORY THAT THE WRONGS ARE TORTS RATHER THAN BREACHES OF CONTRACT.

We shall ask pardon of this Court for introducing herein some definitions of torts and the nature and essentials thereof, and will simply say, that in every one of these

cases cited, the effort was made by the parties who had suffered losses by fire, by reason of the water companies not living up to the terms of their contract, to base these actions upon the theory, that the terms of these contracts were also public duties and obligations, owed by the water company to the citizen and taxpayer of the municipality with which it had its contract for supplying water. If this claim could be maintained, it ought, of course, be possible to maintain it by expunging the contract, and its terms from the consideration of the Court, and finding out from the mere circumstances of the relations of the parties to each other, what were the public duties of a water supply company to such claimant. In a word, are there any duties and obligations of such a corporation to persons in the position of the respondents here, outside of the contract, except such duty as such a corporation, and every other person, owes to every other person in the community or the land, viz: to so conduct his business, as not to interfere with "the personal security, liberty, property, service of a daughter or servant or the companionship of a wife. Any violation of any one of these rights is a tort, wrongs or injuries, independent of contract."

Bouvier's Law Dic. 1124, head "Torts."

To illustrate, the contract, of course, might be recited as a mere inducement to the action brought by the plaintiff, and then it might be alleged and proven, that the parties being in this relation to each other, the defendant company violated one of the rights above enumerated. If, for instance, in introducing its pipes into a citizen's house or laying them in the street, a defective pipe had been laid or a pipe laid negligently, so that it burst and overflowed and destroyed the property of the complainant, that would be an illustration of a tort committed within the plain purview of the Section of the Code above quoted, and the liability for such negligence is provided for in the contract here. But where

the allegation of the complaint is, that the company bound itself to furnish water "in sufficient quantity, and of a certain or adequate pressure," and that it failed to do so, and thereby, by the mere breach of this stipulated obligation, the plaintiff's property was destroyed, inasmuch as the obligation to furnish water at all, much less in any quantity and of adequate pressure, depends upon the contract solely, and is not a public duty or obligation of a water company, no recovery can be had upon the theory that it is a tort.

And certainly in this Court we need no better definition of the distinction between tort and contract than its own language through Mr. Justice White, quoting Kelley vs. Metropolitan Ry. Co., 1st Q. B. 944:

> "The distinction is this: If the cause of complaint be for an act of omission or non-feasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action, (because no duty, apart from contract, to do what is complained of exists), then the action is founded upon contract and not upon tort.
>
> Atlantic and Pac. R. R. Co. vs. Laird, 164 U. S. 399.

We beg to add to the quotations from the cases on the subject of this liability of Water companies, merely the following, from an exhaustive decision by Chief Justice Bleckley, of Georgia, on this point:

> "There being no ground for recovery treating the action as *ex contractu*, is it better founded treating it as one *ex delicto?* We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute,

the city is not liable for failing to protect the inhabitants against the destruction of the property by fire.

Wright vs. Augusta, 78 Ga., 241 Amer. and Eng. Encyclopedia of Law, volume 7, page 977, *et seq.*

"We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking unless to contract relations there is superadded a legal command by statute or express law. We ask again where is the State or express law, which require this Water Company to do the acts which plaintiff says it failed to do?"

Fowler vs. Athens City Water Co., 83 Ga., page 222.

And by U. S. Judge Ricks, before quoted, as follows:

"That this action is not founded on any common law duty, and does not, therefore, sound in tort, is quite evident."

Boston Co. vs. Salem Water Co., 94 F. 240.

This definition applied here, effectually precludes the cause of action from being defined as a tort committed.

In fact up to the time of the happening of the events which form the basis of these claims on behalf of the respondents here at bar, and their obtaining of the decisions tendered by them, in the State Court of North Carolina, the North Carolina Supreme Court limited the definition of a tort to the breach of a common law duty, and insisted that there was no right of action in tort for the breach of a statutory duty, but that such arose upon contract.

"In the absence of legislation there was no duty imposed upon defendant to put up cattle guards. Had this second cause of action arisen from wrongfully

piercing plaintiff's fence and thereby turning in cattle, this would have been a tort. The second cause of action was for failure to perform the duty imposed by the Code, section 1975. An action for the alleged breach of the implied *contract to perform a statutory duty arises upon contract.* A case exactly in point is Utica & Black River R. R. Co. vs. Thomas, 20 Am. & Eng. R. R. 93."

Hodges vs. R. R. Co., 105 N. C. 171.

VIII.

THIS COURT HAS ITSELF DETERMINED THIS QUESTION, THAT A WATER COMPANY OWED NO DUTY OR OBLIGATION TO THE CITY, CITIZENS OR TAXPAYERS OF A COMMUNITY, TO FURNISH WATER AT ALL, MUCH LESS OF ANY ADEQUATE PRESSURE OR QUANTITY, EXCEPT SUCH AS MAY BE IMPOSED UPON IT BY CONTRACT LAWFULLY ENTERED INTO.

We quote as follows:

"Having before it the above Act of 1873, amended in 1877, the Court of Appeals in 97 N. Y., page 97, decided in 1894, said that the State authorized the formation of waterworks companies in its towns and villages, (laws of 1877, chapter 171,) *but it does not require one so organized to supply water to the town or village, nor does it require the town or village to take its water from the company so formed.*"

See—Skaneateles Water Co. vs. Skaneateles, 184 U. S. 362.

In a simple word, the duties between these water companies and the cities and citizens with whom it does business, are to be found in the contract between them, and there is no implied or public duty or obligation by virtue of the nature of the occupation or business that they are engaged in, which imposes peculiar public duties upon them, which can give rise

to a claim in tort, where the same claim could not be supported against persons not incorporated. To state the case simply, the public duties of water companies with regard to furnishing water to cities and citizens are the same as would be the duty of the old water carrier or person owning a private supply of water which he might be in the habit of purveying to the public. In each case the contract must regulate the rights of the parties, and outside of these rights, there can be no duties that are public duties, except the obligation resting upon every one in the community to carry on their business without interfering with the persons and property of others. In a word, water companies cannot be added to the limited class made up of inn-keepers and common carriers.

IX.

THE CASE OF COY VS. INDIANAPOLIS GAS CO. 36 L. R. A. 535, 146 INDIANA, 655, WAS RELIED ON BY RESPONDENTS BELOW, AND SEEMED TO IMPRESS THE JUDGE OF THE U. S. CIRCUIT COURT, AS SHOWING THAT SUCH A COMPANY OWNED PUBLIC DUTIES, OUTSIDE OF THE CONTRACT, THE BREACH OF WHICH MIGHT BE CONSIDERED A TORT. BUT THIS SAME SUPREME COURT OF INDIANA SAID, THAT A WATER SUPPLY COMPANY OWES NO SUCH DUTY, AND A BREACH OF THE ORDINANCE, CONTAINING THE CONTRACT BETWEEN IT AND THE CITY, CANNOT BE MADE THE SUBJECT OF AN ACTION OF TORT, OR OF ANY ACTION WHATEVER.

The case of Coy vs. Indianapolis Gas Co., above cited, was quoted by the U. S. Circuit Judge below, as bearing out the finding of the North Carolina State Court, in which he felt bound to concur, that a breach of the terms of the contract here, might be a tort, and give rise to such action. Whatever may be the merit of the decision in that case, in the eyes of this Court, (and we respectfully suggest that the reasoning therein is more than doubtful) we desire the Court to note, that the Supreme Court of Indiana in 1894, at the time the rights of these parties under the mortgages had

accrued, decided with particularity, that a water supply company, being a mere agent of the city in the performance of its governmental work, owed no public duty to the citizens to furnish water of any or adequate pressure, that the obligation subsisted in contract alone.

We quote from that case, as follows:

> "Such an ordinance (contract with water company) is a governmental matter, which the city might enact or not, as seemed best. There is no public duty under such ordinance, the violation of which, would render the city or the water company liable to any one who might suffer a loss of property, by fire, because of insufficient water pressure, where sufficient pressure might have been supplied and the loss avoided."
>
> Fitch vs. Water Co. 139 Ind. 214.

In this connection it should be noted, that one reason why the contract between the city and the water company cannot be treated as the contract of the citizens of the city with the water company, is because the city is not the agent of its citizens, but is the agent or sub-agent of the legislature.

X.

A Few Definitions of Torts to be Applied to This Case.

> "It is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes, the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract. And the classification is not very accurate, etc. Breaches of contract were mere failures to perform agreements, etc. Other acts or omissions giving rise to suits at law were called specifically wrongs or torts, etc. And the English Common Law Procedure Act of 1852 defines a tort as 'a wrong independent of a contract,' which is perhaps

as good a definition as can be given, though even this may require explanation, since in many cases a tort only arises in consequence of the disregard of contract relations."

Cooley on Torts, 2 and 3.

"Indeed, in many cases an action for tort or an action for a breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction of the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such action will enable us to solve the seeming difficulty."

Cooly on Torts, 2d edition, 104.

The author then goes right on to show that the exceptions do not really contradict the above rule of distinction and how, if deceit is practiced by means of false warranty, the purchaser may sue upon the contract or he may bring suit for the tort.

"The tort consists in his having been by fraud and falsehood induced to make the purchase. There is a broken contract, but there is also something more, there is a deception to the injury of the purchaser, in procuring the contract to be made, etc. The tort in such case is connected with the contract only as it enabled the tort feasor to bring the party wronged into it."

Then the author also designates the relations arising out of the contract of these practising peculiar callings, to which *the law* attaches certain duties, such as inn keepers and common carries, and then adds:

"But these are exceptional cases; the rule is general, that where contract relations exist the parties assume

towards each other *no duties whatever* besides those the contract imposes."

We ask if the test is not right here, that if the duty broken is only that of the contract, and not that imposed by law, either common or statutory, it is not a tort in the true acception of that term, and the test to be applied here is, was there any other duty resting on these parties than the exact terms and stipulations of the contract? Certainly no other duties were alleged in the complaint, and no other duties were proven, and it is not too much to say that no other duties can be imagined which could have been made the cause of action brought by these respondents than those specified in the contract, hence the breach of these duties, not being forbidden by law cannot be a tort.

We quote further:

> "A tort has been defined as a wrong independent of a contract." (a) This is the definition of the Common Law Procedure Act of 1852. "*The omission to perform a contract obligation is never a tort unless that omission is also an omission of a legal duty.* The ordinary essence of a tort consists in the violation of some duty to an individual, which duty is different from the contract obligation, yet a tort may grow out of or make part of, or be coincident with, a contract, and precisely the same state of facts between the same parties may admit of the action, either *ex contractu* or *ex delicto.* In such cases the tort is dependent *upon*, while at the same time independent *of* the contract, for if the law imposes a legal duty upon a person the negligence of that duty may constitute a tort founded upon contract."
>
> Addison on Torts, 6th Edition, page 1.

This is a clear statement, that unless the breach of the terms of the contract is also *the breach of a legal duty, independent of the contract*, it cannot be a tort, whatever be the

form of the action employed. The legal duty must be a duty imposed by law, either common or statutory.

We quote further from Addison, on "So-called torts founded on Contracts:"

> "*A tort having been defined to be a wrong independent of a contract, it follows, that if that definition is correct, there can be no tort founded on contract, and that the so-called tort founded on contracts are breaches of contract and not torts.*"
>
> Addison on Torts, 6th edition, section 14, page 20.

We call particular attention to this clear definition by Addison, because of the reference to that author by the Court in its opinion below, which reference, however, can only be upon the subject, that either form of action may in certain cases be used at the option of the pleader. As Addison states clearly, that fact does not interfere with the true and substantial definition of the differences between contract and tort. So much for one of the authorities quoted by the Court. We propose to examine the others. The citation by the Court below from 2d Jaggard on Torts, is followed on page 898 by these words:

> "All persons contracting to do certain things, owe a duty not to injure persons or property of another, while in the performance of the contract. That duty does not necessarily depend on or grow out of the contract."
>
> 2d Jaggard on Torts, page 898.

Can there be a better definition of the fact, that there may be negligence in the performance of a contract, which can be sued on as a tort, but that that negligence does not consist in the mere omission to perform the contract? In a word, it is a "sin of commission" and not of "omission," which is referred to. But no author's definition is more clear than

Jaggard's between substantive torts and what are called "*quasi* torts" or shows more clearly that it was this latter class, which were often sued upon and permissibly by forms of action *ex delicto*. We quote as follows:

> "Even certain actions which are really based on a contract, and might be sued *ex contractu*, may be brought in the form of an action *ex delicto*, to evade either a Statute or ordinary provisions of law * * * Such actions were so successful that Lord Tenterden's Act was passed to make the Statute of Frauds cover as to these points, both actions *ex delicto* and actions *ex contractu*. * * * Accordingly a person, whenever he could, would sue *ex delicto* rather than *ex contractu*"
>
> Jaggard on Torts, Vol. 2, pages 25 and 26.

And again:

> "With respect to '*Quasi* Torts,' the confusion is perhaps inextricable."
>
> Jaggard on Torts, page 27.

And again:

> "With the abolition of forms of actions, artificial distinctions involved in the choice of remedies—the *juggling with remedies* should disappear. In such jurisdictions the inquiry should be, *not as to the remedy formerly given by the common law, but as to the real nature of the right.*"
>
> 1st Jaggard on Torts, 28–29.

Does it not appear here clearly that the Court below has been made the victim of this "juggling with remedies," and that the error was committed in directing its inquiry solely as to the remedy formerly given by the common law, and not as to the real nature of the right? But we refer this Court to the definition most of all approved by Jaggard:

> "Chambers vs. Baldwin, 91 Ky. 121, 15 S. W. 57. A very simple, but in many respects admirable definition

suggested is 'a tort as a breach of duty fixed by municipal law, for which a suit for damages may be maintained.' It will subsequently be seen that the duties, for the violation of which an action in tort can be maintained against a common carrier or a master, are really fixed by municipal law, although they may be also incorporated in the contract."

1st Jaggard on Torts, page 6, note 15.

We ask this Court, if the breach of contract with a municipality, is what the Kentucky Court, so approved by Jaggard, meant by a duty fixed by municipal law? Surely it is needless to say that a contract with a municipality is not a municipal law, unless we can point to the common and statutory law of the land, outside of that contract, which imposes the same duty. We refer again to a quotation in the opinion of the Court below from Chitty on Pleading which shows how the Court was misled by partial quotations suggested to it. This quotation is as follows (from page 393 of Record):

"When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of that duty, which we have seen, may be founded either on a contract between the parties or on the obligation of law arising out of the defendant's particular character or situation." The finished sentence or quotation is "and the plaintiff must prove such duty as laid down and a variance will, as in *action on contract* be fatal. When the declaration is for the breach of an express or implied contract, and proceeds for non-feasance, the consideration of the contract must be stated either in terms, or in substance, but when it is for a misfeasance or for malfeasance, no consideration need be stated, and when it is founded on the obligation of law unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which give rise to the defend-

ant's particular duty or liability, as in actions against sheriffs, carriers, inn keepers, etc." (See Chitty on Pleading, 16th Am. Edition, page 397.)

But no text-book writer has stated more plainly than Chitty, just what sort of a breach of the obligation of contract may constitute a tort. We quote his exact words:

> "And it seems that although there be an express contract, still if a *common law duty* results from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract."
>
> 1 Chitty on Pleading, page 152, 16th Am. Edition.

Speaking of the jurisdiction of the Court of Claims the Supreme Court has said:

> "The jurisdiction of that Court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle, originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law," etc. "While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one," etc., etc. "This policy is

founded in wisdom, and it is clearly expressed in the act defining the jurisdiction of the Court, and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, as well understood in our system of jurisprudence."

Langford vs. U. S., 101 U. S. page 346.

And again:

"The language of the statutes conferring jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged on the discharge of official duties."

Gibbons vs. U. S., 8 Wall. page 276.

Here is the defination of a tort: Unauthorized wrongs. "Violation of the legal rights of some one." But they must not be wrongs which consist in the violations of rights under a contract either express or implied, because in that case the government would have been liable.

We also beg attention to the distinction between a misfeasance, which is a tort within the general acceptation of the term and certainly would answer nearly to the phrase "torts committed" in this section of the North Carolina Code, and a non-feasance, which cannot at most be made to amount to more than a breach of contract, according to the Supreme Court of Pennsylvania, interpreting the Code of that State, in relation to contracts and torts, which may be found in—

McCahan vs. Hirst, 7 Watts, page 178 (Sup. Ct. of Pa.)

XI.

THE CIRCUIT JUDGE BELOW CONCLUDED THAT THE FIRST MORTGAGEE HERE HAD SUBSTITUTED THE LIABILITY OF THE OLD COMPANY AND ITS LIEN FOR THE LIABILITY OF THE NEW COMPANY AND ITS LIEN, AND, THEREFORE, THAT THE FIRST MORTGAGEE BECAME THE GRANTEE UNDER ITS MORTGAGE OF THE NEW COMPANY, THE GREENSBORO WATER SUPPLY COMPANY, AND AS SUCH RESPONSIBLE FOR ITS ACTS OR TORTS. THIS SEEMS A STRANGE MISTAKE.

Notwithstanding the fact that the Record shows that when the Greensboro Water Supply Company was organized in 1896, and purchased the property of the Greensboro Water Company under the decree of sale at the instance of the second mortgagees of that company, that such sale, according to the terms of the bill of foreclosure and the decree of Court foreclosing and selling, was made subject to the lien of the first mortgagee, the petitioner herein mentioned, the Court concluded that these first mortgagees waived its lien and accepted the lien given by the new company for the reason that it said some of the bondholders under the first mortgage were aware of this action. It was fully explained by the witness, Mr. Taylor, in his testimony in the Record, page 98, that Mr. Hugh L. Pope, who purchased at the foreclosure sale of the second mortgage, did not represent the first mortgagees of the Greensboro Water Company, or this petitioner, the Guarantee Trust and Safe Deposit Company, but that he represented only the other security holders of the old company. What was done with the knowledge of certain of the bondholders, of course could not affect the trustee for all of them, nor could it affect the present holders of those bonds, into whose hands they have come, being negotiable securities. But even had this trustee and all the bondholders under its mortgage, then and now assented to the sale in the way it was made, they certainly assented only to the very terms in which it was made, viz: subject to the lien, operation and effect of the mortgage to this petitioner, the Guarantee Trust

and Safe Deposit Company. How can it be said that when the terms of sale were that, that mortgage and its obligations should be sacredly preserved, that they assented to have it exchanged for another mortgage and another obligation? But the very Judge who delivered this opinion in the case at Bar, had clearly recognized both before and since the decision of this case below, that the creditors of a company whose property was sold subject to the lien of a mortgage upon it, and passed to another company subject to that lien, was entitled to all the property of the old company, until their lien was fully satisfied, and that the new company never received any property at all, except subject to the lien of the mortgage made by the old company, and that the judgment creditors of the new company could not by execution touch and displace any of the property comprised in the lien of the mortgage of the old company.

Fidelity and Deposit Co. vs. N. & W. R. R., 19 Fed. R. 175.

Then again this same Judge made the following decision, affirmed by this Court, as before mentioned:

"It is said also that under the statute law of North Carolina, the judgment for tort committed by a mortgagor took precedence of the lien of any mortgage executed by the mortgagor upon his property. *This is doubtless so, as to any property held* by the mortgagor at the time the tort was committed; but can it be said that the commission of a tort and the judgment had thereon shall have such retroactive operation as to spring a lien upon property which by operation of law passed out of possession, ownership and control of the mortgagor long before the tort was committed? Surely not."

Julian vs. Central Trust Co., 115 F. R. 957. Affirmed 193 U. S., page 93.

These two cases taken together from this Circuit, clearly decide that the judgment against a company in the position of the new company could not be used to disturb the property of the grantee of the old company, and further, that the tort, if looked upon as the commission of the old company, and a judgment obtained against the old company, no execution could be issued thereon against the new company which had received the property prior to the happening of the so-called tort.

It should also be noted in this connection that the reasoning by which the learned judge of the Circuit Court determined that the Greensboro Water Company had become defunct as to all its old liabilities at the time of this foreclosure and sale, and that consequently its liability and the lien it had given this first mortgagee had been extinguished, is certainly a strange conclusion, but due to the fact that he had before him only a partial quotation of section 698 of the Code of North Carolina. We quote the concluding portion of the section 698 of the Code, apparently overlooked by said judge:

> "*And when a corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued* AS BEFORE, *for the purpose of collecting debts due it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto.*"

Therefore, it is plain that the Code kept the old company alive, so as to prevent any extinguishment of any lien or liability given by it, and preserved the new company from

all the liability of the old company, except such as it might expressly assume as its own.

XII.

THE CONSTITUTION OF NORTH CAROLINA EXPRESSLY PREVENTS THE FRANCHISES OF THESE WATER COMPANIES FROM BEING MONOPOLIES, AND IT IS ONLY TO COMPANIES CREATED MONOPOLIES BY LAW, THAT ANY SORT OF DUTY OR OBLIGATION OUTSIDE OF STRICTLY CONTRACTUAL ONES, ARE ATTRIBUTED BY THE LONELY CASE OF COY VS. INDIANAPOLIS.

The learned Circuit Court below apparently argued, that apart from the terms of the contract between the water company and the city, there was a legal duty on the part of the water company to furnish water of the exact measure and pressure stipulated in the contract, as these respondents had charged in their *pleadings*.

The test of this curious logic is, what would become of this duty, if there were no contract to which to resort to define such duty? We have quoted C. J. Bleckley in Fowler vs. Water Company, 83 Ga., page 222, asking for a sight of the statute imposing any duty. But we desire to have this Court note, that the judge in the case of Coy vs. Indianapolis founded his whole argument on the ground, that the State had granted a monopoly to the Natural Gas Company, defendant in that suit. In this case, this water company had no monopoly whatever. No citizen of the town was in law or practice obliged to take water from it. Any other means of getting water was open to them all. The city and State were free to grant similar franchises to other companies or persons to an unlimited extent to lay pipes and furnish water. It could go into the business itself, and this record shows it was preparing to do so. Any citizen, or the city itself, who was dissatisfied with the service of this company, could have

discontinued it at any time. This company had no fragment of a power of eminent domain.

Constitution of N. C., Art. I, sec. 31.
Smith vs. City of Goldsborough, 127 N. C. 350.
Washington Toll Bridge Co. vs. Beaufort, 64 N. C. 155.

ARCHIBALD H. TAYLOR,
JOHN PEIRCE BRUNS,
W. P. BYNUM, JR.,
For Petitioners.

[redacted]

Supreme Court of the United States

[redacted]

[redacted]

THE [redacted] COMPANY
AND THE [redacted] AND [redacted]
COMPANY, Appellants,

vs.

S. J. FISHER, A. M. SCALES, Assignee of A. A. Hinkle;
A. M. SCALES, Assignee of Hinkle, Fisher & Co.,
AND HENRY H. SIMMS, Appellees.

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Statement of Facts,
Brief and Argument
for Appellees.

PETITIONERS' BRIEF IN REPLY.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 75.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, *Petitioners,*

vs.

B. J. FISHER, A. M. SCALES, Assignee of A. A. HINKLE; A. M. SCALES, Assignee of HODGIN, PEGRAM & CO., AND HELEN G. BROWN, *Respondents.*

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The petitioners beg leave of the Court to submit brief corrections of certain errors and mis-statements in the brief of the respondents in these proceedings.

I.

NEITHER THE TRUSTEE UNDER THE FIRST MORTGAGE OF THE GREENSBORO WATER COMPANY TO THE GUARANTEE TRUST AND SAFE DEPOSIT COMPANY OF PHILADELPHIA, THE PETITIONER

THERE, DATED JANUARY 10TH, 1888, NOR ANY OF THE BONDHOLDERS THEREUNDER, EVER ASSENTED TO EXCHANGE THEIR LIEN AND THE LIABILITY OF THE GREENSBORO WATER COMPANY FOR THE LIEN OR LIABILITY OF THE GREENSBORO WATER SUPPLY COMPANY, BUT THE LATTER COMPANY RECEIVED NO RIGHT OR INTEREST IN THE PROPERTY AT ALL, EXCEPT SUBJECT TO THE LIEN OF THE BONDHOLDERS OF THE ORIGINAL MORTGAGOR COMPANY.

Both the learned judge of the Circuit Court and the respondents in their brief filed in this proceeding, acknowledge that the Greensboro Water Supply Company, when organized, took the property subject to the lien of $50,000, reserved in favor of the first mortgagees of the Greensboro Water Company. (See opinion of U. S. Circuit Court, Record, page 390, respondents' brief, page 5.) But the judge below erroneously drew the inference of law, that because it was averred in the bill filed by the second mortgagees, in 1893 (Record, pages 188-192) that some of the first mortgage bondholders of the Greensboro Water Company, knew of their proceedings and assented that a receiver should be appointed and the sale of the said property made *subject to the lien of the first mortgage under which said first mortgage bonds are secured*," that thereby these first mortgage bondholders exchanged their lien and liability under their first mortgage for the lien and liability of the newly organized company. This seems certainly a strange inference, that the alleged assent of these first mortgage bondholders, if there ever was any, which could bind these negotiable securities, was to be interpreted exactly contrary to the terms of their assent, as alleged by these second mortgage bondholders. And the respondents, in their brief, in order to try and give color to the inference, quote a fragment of the testimony of the witness, Mr. A. H. Taylor, from the Record, page 93, in which he said, "the holders of all the securities of the old company said, we will purchase or agree (I was one of them to a small extent) to bid for the

property through our agent, Mr. H. L. Pope," etc.. etc. Mr. Taylor's complete testimony, a little further on, was most particular, to the effect, that what he meant "by the holders of all the securities of the old company," was "the second mortgage bondholders, stockholders and creditors of the old company, *other than the first mortgage bonds*," for he says "Hugh L. Pope was depositary and agent of all the security holders of the Greensboro Water Company, who desired and planned the re-organization and he purchased the property and re-organized it as purchaser in the manner I have described." (See Record, 10 x-q, page 98; 8 x-q, page 98.) And in answer to 12th x-q, Record, page 98: "Did he in your re-organization represent the first mortgage bondholders of the Greensboro Water Company?" "He did not." And to the 14th x-q, page 99: "Do you know that he did not represent the Guarantee Trust and Safe Deposit Company of Philadelphia, trustee, or the first mortgage bondholders?" "I do know it just as positively as a man can know a negative or prove it. The first mortgage bondholders were never consulted with, or affected by that proceeding. Their interest was always kept paid up, and it was considered, that they had no interest in the proceeding, as we only sold and took subject to their rights." (See Record, page 99, 14th x-q.)

When, therefore, the respondents suggest, as they do in their brief, that in order to protect themselves from the consequences of the tort of the new company, these first mortgagees of the old company should have foreclosed their mortgage, and taken into their possession, the question arises, how they could have done this when the interest on their first mortgage bonds and every term of the same has been carefully paid and performed by the purchasing company, the Greensboro Water Supply Company, up to the date when the record below was made up.

The Court below was misled by the mis-statement of the respondents above, and also by their partial quotation of

section 698 of the North Carolina Code, (see brief of respondants, page 22, petitioners' brief, 61) where the subsequent half of the section, which states that the old company is kept alive to respond to its own debts, so long as they are unsatisfied, is omitted. Of course the object of this, is to avoid the effect of the decision in Julian vs. Central Trust Co., already quoted in the petitioners' brief, in which the U. S. Circuit Court of Appeals below, affirmed by this Court, decided expressly, that the holders under a first mortgage, subject to which the property of a company had been sold, could not be affected by the torts of the re-organized or purchasing company, which took no interest, that could be affected by judgments against it, except subject to the full lien of the first mortgage of the old company which had been retained in place.

See—Julian vs. Central Trust Co., 115 F. R. 957.
Affirmed 193 U. S. page 93.
And Petitioners' Brief, page 60, Respondents' Brief, page 28.

II.

THE CLAUSE QUOTED APPARENTLY IN RESPONDENTS' BRIEF, PAGE 40, THAT A WATER COMPANY SHALL BE RESPONSIBLE FOR ALL DAMAGE SUSTAINED BY THE CITY, OR ANY INDIVIDUAL OR INDIVIDUALS FOR ANY INJURY SUSTAINED FROM THE NEGLIGENCE OF SAID COMPANY, EITHER IN CONSTRUCTION OR OPERATION OF THE PLANT, WAS NOT IN THE CONTRACT SET OUT IN THE JUDGMENT ROLL, RECORDS OR PROCEEDINGS BROUGHT BY RESPONDENTS IN THE STATE COURT.

Although the effect of such a clause has been fully treated of in the opinion of Judge Ricks, Boston, S. & D. Co. vs. Salem Water Co., 94 Fed. 240, and nearly all the cases on the subject of the liability of water companies, viz., that it gives no right whatever upon which anybody can sue, other

than the city which is a party to the contract, and really adds nothing to change the rights of the parties, it ought in fairness to be explained to the Court, that this clause was not in the contract, which was filed as an Exhibit in the actions brought by Fisher and others, the Judgment Rolls of which are in the Record, and which contrrct is set out twice in the Record below, viz., with the Master's Report (at page 106 of Record) and in the Judgment Roll of Fisher and with his declaration (Record, page 270). It appears only in a supplemental contract which was never produced in evidence in any of the proceedings upon which judgments were obtained by Fisher and others, the respondents here, against the Greensboro Water Supply Company, as can be seen by the full record of those proceedings. (Record, pages 260 to 384.)

This supplemental contract was made with the receiver of the Greensboro Water Company in 1893, while that company was in the receiver's hands, prior to the sale to Hugh L. Pope, and its organization as the Greensboro Water Supply Company, and the Superior Court of Guilford County, and the juries never had it before it in evidence in the suits brought by the respondents in that Court, and it was introduced in the Circuit Court of the United States below merely by agreement of counsel. (See Record, pages 188 and 200.) It has, therefore, no place whatever in considering the complaint and action of Fisher and others in the Superior Court of Guilford County, North Carolina.

III.

THE RECEIVER IN THIS CAUSE WAS MADE NO PARTY TO THE ACTION BROUGHT BY THESE RESPONDENTS HERE IN THE STATE COURT, NOR DID HE APPEAR OR ANSWER IN THOSE PROCEEDINGS AS IS ASSERTED IN RESPONDENTS' BRIEF.

The respondents' brief at page 19, bottom thereof, says: "It appears affirmatively from the record that the receiver of the U. S. Court in the main case appeared in the State

Court and filed answers to the actions upon which these judgments were rendered." This is an inexcusable mis-statement, for just the opposite appears from the record. The first and second answers of the defendant to the complaint of B. J. Fisher, in the Superior Court of Guilford County, appear on pages 280 and 284 of the record, and are the answers of the defendant, the Greensboro Water Supply Company, solely, sworn to by the secretary and superintendent of the company, and the receiver never appeared and answered, and was never a party to the action, in any way. If this statement intends an allusion to the fact, that the law firm, of which the receiver was a member, was of counsel for the defendant company, the mis-statement is still equally inexcusable and inexplicable, except to prove that respondents recognize that they cannot use the judgments obtained in the State Court, to conclude the mortgagees, the petitioners, unless they can make these mortgagees, by some hook or crook, parties to these actions in the State Court. But to say that a party is bound by the proceedings in a cause to which he was not a party, because his counsel appeared for another party in that other cause, is probably the most far-fetched inference ever attempted, and to state the inference as a fact is simply inexcusable, we respectfully protest.

IV.

ALL THE CASES TO THE EFFECT THAT A JUDGMENT IN A STATE COURT IS *prima facie* BINDING OR CONCLUSIVE, WHEN PRODUCED IN A U. S. COURT, OF COURSE ARE CASES OF JUDGMENTS BETWEEN THE SAME PARTIES.

The authority quoted on respondents' brief, page 16 says: "That is to say, such a judgment, when pleaded in a Federal Court, is a bar to any other litigation of the same cause of action between the same parties." There will be no controversy about this doctrine between the parties here.

V.

RESPONDENTS' OWN STATEMENT OF THEIR RIGHT OF ACTION IS ITS BEST REFUTATION.

Recollecting always, that the Constitution of North Carolina, article I, section 31, as construed in Washington Toll-bridge vs. Beaufort, 81 N. C. 500, expressly prevents any contract, such as is shown here between the city and the Water Company, from being exclusive, or monopolistic, in effect, we would hardly desire a better test of the obligation or rule of conduct binding upon the Water Company here, than is set out in the following quotation from the respondents' brief. That is, if we adopt a well-know method of arriving at a definition, viz: By defining its opposite. We quote from page 34 of the respondents' brief:

> "*First.* Corporations enjoying public franchises and engaged in public employment, for which they receive toll, owe a duty to the public as well as to each *individual* to perform the duties undertaken and incident thereto, which duty, in this case, was almost exclusively to furnish a sufficient *pressure* of water to extinguish fires.
>
> "*Second.* This obligation, raised by the law, is added to and superinduced by the provisions of the contract under which the corporation is acting."

And also from page 40:

> "In the case at bar our contention is, briefly, that the Water Company, by its acceptance of its franchise and taking by eminent domain, the exclusive use of the streets and public grounds of Greensboro for the purpose of furnishing the city and its inhabitants with a sufficient water pressure at all times to extinguish fires; that the law of the land, then and there, imposed upon the Water Company an obligation to perform this duty. That the Water Company emphasized and made certain

this obligation and duty, *by entering into a contract with the city to do* certain things."

What are these "certain things?" There are found in Section 9 on page 273 and Section 19 of the Contract on page 276 of Record.

> "They agree that the works shall throw six streams of water from six hydrants to a vertical height of one hundred feet in still air, each stream being taken from one hydrant with one hundred feet of hose and a one-inch ring and nozzle." "That said grantee shall maintain a head of at least seventy feet in the stand-pipe or storage tower," etc. etc.

These, according to respondents, have been made *common law obligations by virtue of the charter and contract*, and the breach of them, is a breach of the law of the land and a tort. (Sic.)

We will compare with this statement of the respondents' case the quotation already taken from this Court on page 49 of petitioners' brief,

> Skaneatles Water Co. vs. Skaneatles, 184 U. S. 362,

and Judge Bleckley's crisp sentence, also before quoted:

> "We ask again, where is the State or express law which require this Water Company to do the acts which plaintiff says it failed to do?"
>
> Fowler vs. Athens City Water Co., 83 Ga., page 222.

ARCHIBALD H. TAYLOR,
JOHN PEIRCE BRUNS,
W. P. BYNUM, JR.,
For Petitioners.

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PETITION FOR RE-HEARING.

Supreme Court of the United States

October Term, 1905.

No. 14.

GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY

vs.

J. FISHER, A. M. SCALES, Assignee of A. A. Hinkle; A. M. SCALES, Assignee of Hodgin, Pherran & Co.— and HELEN G. BROWN.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

JOHN PRINCE BROWN,
W. P. BYRUM, JR.,
ARCHIBALD H. TAYLOR,
For Petitioners.

PETITION FOR RE-HEARING.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 75.

GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY

vs.

B. J. FISHER, A. M. SCALES, Assignee of A. A. HINKLE; A. M. SCALES, Assignee of HODGIN, PEGRAM & CO., AND HELEN G. BROWN.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Having carefully examined the opinion of the Court, we think that with propriety we may ask the Court to consider whether this case be not one in which it will be proper to grant a re-hearing, upon the following grounds:

I.

THE OPINION OVERLOOKS THE RECENT DECISION OF JULIAN VS. CENTRAL TRUST COMPANY, 193 U. S., PAGE 101, WHICH WAS TO

THE EFFECT THAT THE LIEN OF A MORTGAGE COULD ONLY BE SET ASIDE UNDER SECTION 1255 OF THE CODE OF NORTH CAROLINA BY A JUDGMENT FOR TORT COMMITTED BY THE MORTGAGOR COMPANY, WHICH MADE THE MORTGAGE IN QUESTION, AND WHICH POSSESSED THE PROPERTY IN QUESTION AT THE TIME IT COMMITTED THE TORT, AND NOT FOR A TORT COMMITTED BY THE SUCCESSOR OR ASSIGNEE OF THAT COMPANY, WHOSE TORT COULD ONLY AFFECT A MORTGAGE MADE BY ITSELF, AND SUCH ASSETS AS SUCH SUCCESSOR COMPANY POSSESSED AT THE TIME OF MAKING ITS OWN MORTGAGE.

The Court, in its opinion here, has found that the judgments of Fisher and others, the intervenors, for torts committed in 1897 and 1899 against the Greensboro Water Supply Company, which had purchased the property in these proceedings at a foreclosure sale made April 30, 1896, under decree of the United States Circuit Court, "subject to the operation and effect of a mortgage made by the Greensboro Water Company to the petitioner, the Philadelphia Company," took precedence over that mortgage under Section 1255 of the Code of North Carolina. During the argument it was remarked by several of the Justices sitting, that as respected this petitioner, the Philadelphia Company, the case was apparently the Julian Case, (Julian vs. Central Trust Co., 193 U. S. page 101), which decided that a judgment for a tort committed by a railroad company which had purchased at a foreclosure sale, subject to a prior mortgage made by a predecessor company, could not affect the lien of that prior mortgage. In the Julian Case execution was levied against the property operated by the Southern Railway Co., which had purchased the property of the Western North Carolina Railway Co. under decree of foreclosure May 2, 1894, subject to mortgages from the last named company to the Central Trust Co. Just as here, the property was held and operated by the Greensboro Water Supply Company, which had purchased the property of the Greensboro Water Company, subject to a mortgage made by the last named company to the Guarantee Company of Philadelphia. In both cases the alleged tort was committed by the purchasing company after it

had obtained possession of the property and was operating it, *i. e.*, Mrs. James and Mrs. Howard brought their actions March 20, 1897, and obtained their judgments for the wrongful killing of their husbands in the employ of the Southern Railway Co. They sued the Southern Railway Company under the name of the Western North Carolina Railway, because they claimed, just as Judge Simonton said in the decree in this case below, "the new corporation was but a continuation of the first." (Judge Simonton's opinion, Record, page 190.) They did this, because it had been decided in the same circuit, that a judgment against the purchasing company, *i. e.*, the Norfolk and Western Railroad Company, purchaser at a foreclosure sale of the Roanoke and Southern Railway, subject to a mortgage to the Fidelity Insurance Company, did not take precedence over the mortgage, subject to which the purchase was made. We quote the language of the Court in this last named case:

> "The question in this case is this: Is this judgment held by the intervenor a liability incurred in the operation of the railroad and property sold which is prior in lien or superior in equity to said mortgage? There can be no doubt, that if the suit of Hampton (the intervenor) had been brought against the Roanoke and Southern Railway Co. the mortgagor (and former owner) and the judgment had been obtained and entered against that company, under Section 1255 of the Code of North Carolina, the judgment would have been preferred to the mortgage debt." * * *
>
> "The protection afforded by this Section is to an execution obtained in the Courts of the State *against such incorporation; that is to say, the incorporation which has made a mortgage upon its property or earnings whether in bonds or otherwise.* This is a statutory remedy, and must be strictly followed. East Tenn. V. & G. R. R. Co. vs. South Tel. Co., 112 U. S. 306. It is in derogation of the common law. Its purpose is to displace a vested lien, and either annul or

greatly vary the terms of the mortgage contract. It must, therefore, be strictly construed. Douglas vs. Lewis, 131 U. S. 75. In enforcing it, Courts cannot add to the words of the Statute, and make them apply not only to executions upon judgments obtained against the mortgagor corporation, but also to judgments obtained against its agents. * * * "

"But Section 1255 secured such priority, only to an execution upon a judgment against the *mortgagor* corporation. The intervenor, as has been seen, has no such judgment, and does not come within the terms of this Section." Quoted from Fidelity Ins. vs. Norfolk & West. Ry. Co., 90 F. R. 176, 177, 178.

Need we repeat here that the intervenors here have no judgment against the mortgagor corporation, the Greensboro Water Company, which executed the mortgage to the Guarantee Trust Company of Philadelphia?

The case just quoted was adopted and incorporated in the decision of the Julian Case in this Court, and we quote from that opinion as follows:

"Nor can we see any room for the application of Section 1255 of the North Carolina Code, making liens for judgments for torts superior to mortgages of incorporated companies. In this case the tort was committed after the judgment debtor had parted with all its property, and there was nothing for such judgment to operate upon." (Jeffrey vs. Moran, 101 U. S. 286.)

Julian vs. Cent. Trust Co., 193 U. S. 109.

The language of the Circuit Court of Appeals below in the Julian case, affirmed by this Court, was almost identical, but we prefer to quote it:

"It is said, also, that under the statute law of North Carolina judgments for torts committed by a mortgagor take precedence of the lien of any mortgage executed by the mortgagor upon his property. (Code, Section 1255.)

This doubtless is so as to any property held by the mortgagor at the time the tort was committed. But can it be said that the commission of a tort and judgment had thereon shall have such retroactive operation as to spring and create a lien upon property which *by operation of law* had passed out of the possession, ownership and control of the mortgagor long before the tort was committed? Surely not." (Jeffrey vs. Moran, 101 U. S. 286.) * * * "The Southern Railway Co. purchased this equity of redemption and the franchise sold, and thenceforward, going into possession, claimed to be the owner thereof." * * * "It does not claim under, but against, the Western North Carolina R. R. Co. It conducts its road in no sense as the agent of this railroad company."

Julian vs. Cent. Trust Co., 115 F. R., page 963.

If these authorities are still the law, and the opinion does not purport to overrule them, judgments against the alleged tort feasor, the Greensboro Water Supply Company, cannot be used as judgments against the Greensboro Water Company, the mortgagor of the Guarantee Trust Company, for the reason, to use the words of the Courts, quoted above, that the Water Supply Company "does not claim under but against" the Greensboro Water Company. The judgments, therefore, could only be used to effect the property which the Greensboro Water Supply Company held at the time the tort was committed, which it had only acquired subject to the operation and effect of the mortgage made by the Greensboro Water Company (against which there are no judgments), to the petitioner, the Guarantee Trust Company of Philadelphia.

The question is a pertinent one, therefore, what is the crime of this Philadelphia Company or its bondholders, that it should be denied the law which was granted the Central Trust Company of Philadelaphia and its bondholders in this Julian Case, the echoes of which decision were still audible in the Court room, when this case was argued, and which the opinion plainly

unavoidably overrules. Is it presumption to ask the Court to reconsider its opinion, and decree, so as to give this class of bondholders, the benefit of the same law, that they granted to the same class of bondholders in the Julian Case?

Is it not also the logical consequence of this same oversight which produces the contradiction between the language of the Court in the opinion in this case with regard to this statute, which says that it is not "to be construed strictly but remedial in its nature and to be construed liberally," and its language regarding a similar statute quoted in the decision above mentioned from Douglas vs. Lewis, 131 U. S. 175–186, as follows: "In respect to deeds the words are to be taken most strongly against the party using them, *while in respect to statutes, if in derogation of the common law, as that under consideration is, they should be construed strictly.*"

Certainly it is in derogation of common law, as the Court has said above, that a judgment against one party for an act done many years after a mortgage has been made by him to another party, the mortgagee, shall render the lien and interest of the mortgagee liable to execution, and it is still more in derogation of it, to construe the statute as the Court has construed it here, that such judgments shall affect the mortgagee, even though he had and never had any connection whatever with the judgment debtor, not even the *quasi* criminal one of having loaned his money on mortgage to the judgment debtor. It is, as the Court has said above, extending this statute, which must be construed *strictly*, far beyond any possible implication of its language.

II.

THE OPINION DECIDES WITHOUT NOTICING AND APPARENTLY APPRECIATING ITS FAR REACHING CONSEQUENCES, THAT EVERY MUNICIPALITY OR WATER COMPANY, THE AGENT OF ANY MUNICIPALITY ONCE ASSUMING TO SUPPLY WATER, IS LIABLE IN TORT FOR LOSSES BY FIRE ARISING FROM NEGLIGENCE TO FURNISH APPARATUS OR SUPPLIES OF WATER, ADEQUATE TO PERFORM THIS STIPULATED OR IMPLIED

DUTY, THE UNAVOIDABLE CONSEQUENCE OF SUCH DECISION IS CERTAIN RUIN TO MOST MUNICIPALITIES AND WATER COMPANIES, POSSIBLE RUIN TO ALL. THE LAW HITHERTO IN ALL OUR STATE COURTS, EXCEPT ONE, AND IN THE U. S. COURTS AND IN ENGLAND WAS CONTRARY TO THIS FROM REASONS OF PUBLIC POLICY. WILL IT BE CHANGED BY THIS COURT WITHOUT A WORD IN REFERENCE TO THOSE DECISIONS?

The opinion states the case thus: "We shall assume, without deciding, that the nature of the causes of action upon which the judgments were rendered, was open for consideration in the Federal Court in the foreclosure proceeding here." Of course, this casts doubt upon the decision of this Court in Brooks vs. Burlington, 101 U. S. 443, Burgess vs. Seligman, 107 U. S. 33, Folsom vs. Township Ninety-Six, 159 U. S. 626, and the numerous cases in this Court and all the Federal Courts cited to the same effect, "that the mortgagees, being no parties to these proceedings, are not bound by the judgments, and both the validity of the same, as against them, and whether the lien, if valid, is paramount to that of the mortgage, are the questions for consideration here."

Brooks vs. Burlington, 101 U. S. 443.

But it does make the decision of the Court in favor of these judgments, as valid causes of action in their nature, and as in no way contrary to the law hitherto recognized as approved public policy, the decison of this Court, and that decision will have the effect of overruling for the future, the decision of every Court of the land, except that invented in North Carolina in the cases of the intervenors here. The petitioners cited in their brief filed below, decisions in England and in the Supreme Courts of about twenty States, where these cases had been tried, up to the happening of these cases, which decided positively, and largely for reasons of public policy, that there was no liability upon the city or private water companies acting under contracts with the city, for the failure to measure up to the express or implied conditions of these contracts, or

assumption of duty, on the part of the city or the company. Since the decision of the cases against the defendant water company here, by the North Carolina State Courts, resulting in the judgments of the intervenors here, and the decision of the U. S. Circuit Court below, reviewed here, approving these North Carolina cases, this question has been tried in the Supreme Court of five States, viz: Ohio, Louisiana, West Virginia, California and Mississippi, being the last five in the list below, and the decisions of the North Carolina cases and of Judge Simonton below, universally disapproved, and this liability was declared not to exist in favor of taxpayers whose property had been destroyed, and the public policy against the rule was clearly recognized and insisted on. We respectfully pray the Court to glance at the cases cited and quoted from on this subject, on pages 33 to 51 of the Petitioners' Brief, and to reconsider, if it is intended to go counter to the universal current of such authorities, without comment. The fact that no comment was made upon these cases whatsoever by the Court, and upon the earnest and full argument of counsel on this subject, and upon this question certified up by the Circuit Court of Appeals, and found by this Court to be a subject of such importance as to justify the issuance of the writ of *certiorari*, cannot possibly mitigate or obscure the fact and effect, that the decision is here made by the Court, that these corporations, municipal and private, are liable for these causes of action, from which hitherto they have been defended, and under the consequences of which liability, few could survive. Is it an unfair illustration to say, that the city of Baltimore, in which we write this petition, would have been bankrupted totally, and may yet be bankrupted by the application of this decision, since it was conceded, that its recent fire failed to be stopped in its fatal progress, by reason of an inadequate supply of water and apparatus? It cannot be said, that the decision relieves, or fails to impose the liability upon municipal corporations. If it be a liability in tort or independent of contract, except so far

as the contract brings the parties in the relation to each other whence the breach of duty arises, it cannot be said that a municipal corporation is superior to this law, but that the private corporation, its mere delegated agent, is subject to it. Every case on this subject, has defined the liability to be the same, and necessarily so, for each corporation, and this Court in its opinion certainly has not intimated, and will hardly intimate that the law, whose semi-criminal breach gives this right of action, respects persons or personalities differently. We quote the last case on the subject :

> "The property owner has the same right against the city, as he has against the private water company performing the same service as agent for the city, no more no less."
>
> Nichols vs. Huntington Water Co., 53 W. Va. 348, 44 S. E. R. 292.

We also quote the reiterated law of the Federal Courts as repeatedly decided in circuit, in a case which carefully considers the North Carolina cases, whose judgments have been imported into this suit. After citing the cases, the U. S. Circuit Court for Kansas, First Division, says :

> "However, the exact question has so often received the consideration of Courts of the highest standing throughout the country, and the conclusion reached has been so uniformly against the liability contended for by the intervening petitioners, that the doctrine of non-liability in such case must be received as the settled law. *A city contracting for a supply of water acts in its private as contradistinguished from its public or governmental capacity, and as there is in this case, no privity of contract, between the water company or the receiver thereof and the city, the liability of the receiver may not be predicated upon any contract right, and as no duty rested upon the water company to furnish the individual owner an adequate supply of water with sufficient*

pressure to extinguish fires, as stipulated in its contract with the city, in the absence of such duty, no liability can be predicated upon its negligent failure to comply with such contract."

Metropolitan Trust Company vs. Topeka Water Company, 132 F. R. 702, on page 704.

We will certainly be pardoned, if we present merely the list of the cases on this subject, most of which were in petitioner's brief:

Atkinson vs. New Castle Water Works Co., 2d Exchequer, 445.

Boston Safe Deposit and Trust Co. vs. Salem Water Co., 94 F. 240-1.

Davis vs. Clinton Water Works Co., 54 Iowa, 60-61.

Vrooman vs. Turner, 69 N. Y. 480.

Becker vs. Water Works Co., 79 Iowa, 419; 44 N. W. 694.

Britton vs. Water Works Co., 81 Wis. 48; 51 N. W. 84.

Hayes vs. City of Oshkosh, 33 Wis. 314.

Nickerson vs. Hydraulic Co., 46 Conn. 24.

Eaton vs. Water Co., 37 Neb. 546; 56 N. W. 201.

Beck vs. Water Works Co., 11 Atl. 300 (Pa. Supreme Court.)

Stone vs. Water Co., 4 Pa. Dist. Rep. 431.

Phoenix Ins. Co. vs. Trenton Water Co., 42 Missouri, (App.) 118.

Howsmon vs. Water Co., 119 Missouri, 304 and note; 24 S. W. 784.

Fitch vs. Water Co. (Ind. Sup,) 37 N. E. 982.

Foster vs. Water Co., 3 Lea, 42.

Ferris vs. Water Co., 16 Nev. 44.

Fowler vs. Water Co.. 83 Ga. 219; 9 S. E. 673.

Mott vs. Manufacturing Co., 48 Kan. 12; 28 Pac. 989.
Bush vs. Water Co. (Idaho), 43 Pac. 69.
Wainright vs. Water Co., 78 Hun, 146; 28 N. Y. Supp. 987.
House vs. Water Co. (Tex. Sup.) 31 S. W. 179.
Water Works Co. vs. Brownless, 10 Ohio Cir. Ct. R. 620.
Wheeler vs. Cincinnati, 19 Ohio St. 19.
Van Horn vs. City of Des Moines, 63 Iowa, 447; 19 N. W. 293.
Taintor vs. City of Worcester, 123 Mass. 311.
Howard vs. San Francis[illegible]1 Cal. 52.
Black vs. City of Columbia, 19 S. C. 412.
Mendel vs. Wheeling, 28 W. Va. 233.
2d Dill. on Mun. Cor., paragraph 976, note, 4th Ed.
Allen & Currey Mfg. Co. vs. Shreveport Water Works Co., 113 La. 1091; 37 So. 980.
Blunk vs. Denison Water Supply Co., 71 Ohio St. 250; 73 N. E. 210.
Sievers vs. San Francisco, 115 Cal. 654.
Ukiah vs. Water Co., 75 Pac. 773 (Cal.)
Nichol vs. Huntington Water Co., 53 W. Va., 348; 44 S. E. 292.
Wilkinson vs. Water Co., 78 Miss. 401.

The Court in its statement preliminary to the decision, after noticing the passage of the ordinance, which contained the contract with the Water Company, which, as we have shown in the brief, under the Constitution of North Carolina and the decision of the Courts of that State, was ineffective to grant exclusive rights or rights of eminent domain, and which ordinance was passed in 1887, went on to say: "A later ordinance provided that said Water Company shall be responsible for all damages sustained by the city or any individual or individuals

for any injury sustained from the negligence of said company either in the construction or operation of their plant." This later ordinance was passed in 1893, six years after the mortgage to the petitioner, the Guarantee Company of Philadelphia. (See Record, pages 200 and 204.)

Moreover, this later ordinance was never put in evidence in the suit of Fisher or any other of these intervenors in the State Court, who made only the original contract their exhibit. (See Record, pages 260-385.)

Yet the Court, in its opinion, adopts this later ordinance as the law governing, though changing, the relations of the parties to each other, the breach of which constitutes the alleged tort. We pass over the unbroken decisions of the Courts on this question hitherto, that such an ordinance is in no sense the law of the land, governing the relations of the parties, the breach of which constitutes a tort, but is a mere contract, which must be sued on by the substantial parties thereto, like any other contract. The language of Judge Ricks, in the Circuit Court of the U. S., concerning a clause much more particular and inclusive than the one quoted, was that

> "this" (the hitherto accepted law on the subject), "is held, even where the ordinance granting the water company its franchise, provides that the water company shall pay all damages that may accrue to any citizen or the city by reason of a failure on the part of the water company to furnish sufficient amount of water to put out fires."
>
> Boston S. & D. Co. vs. Salem Water Co., 94 F. 240.
> Petitioners' Brief, page 34.

An ordinance which must be accepted between the parties, as was this ordinance, is nothing but a contract, and is neither statute nor common law, as was said by Chief Justice Bleckly, with an exactly similar contract before him, in the words:

> "We ask again where is the statute or express law which require this water company to do the acts which plaintiff says it failed to do?"
>
> Fowler vs. Athen City Water Co., 83 Ga. 223.

But the decision, as we have said, makes this later contract define the rights of the parties, which had been defined by a contract made coincident with the mortgage mentioned, and if, therefore, this ordinance is to be called "law," it is certainly a law which impairs and alters the obligations of the contract. But the attempt to make the language of this contract, the law of the land, and the breach of it, a breach of the law of the land,—*i. e.*, a tort—brings into clear relief the new definition of a tort, which is made by this decision, with its destructive consequences to municipalities and water companies above mentioned. The decision is only enabled to reach its result by quoting and adopting as the law of this Court, the language of the Supreme Court of North Carolina in the Fisher Case, as follows:

> "There was an express and legal obligation on the part of the defendant to provide and furnish ample protection against fires, and a breach of *that* obligation and a consequential damage to the plaintiff. Although an action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action and the plaintiff so declared. He stated the facts out of which the legal obligation arose fully and also the obligation itself, and the breach of it and the damage resulting from that breach."
>
> Fisher vs. Greensboro Water Supply Co., 128 N. C. 375-379.

But the decision failed to note, and it is important to know, whether it approved or disapproved, the language of the same Court in the case of another of these intervenors, whose judgment is set out in the record, as follows:

> "On a breach of contract, whereby the property of the citizen is destroyed, *he as the beneficiary of the contract* is entitled to sue, and whether there was a breach of the contract and whether it was the proximate cause of loss,

regarded as matters of fact, will be determined by the jury."

Gorrell vs. Water Co., 124 N. C. 337.

These decisions stand together, and are part of the same case made here, and it appears clearly from them, that it was only because it was a breach of the contract, that these parties were entitled to sue, that it was only because the contract specified the law, that it was the law. There is not a failure specified in all the long declarations in Fisher's Case, except the failure to measure up to specific requirements of the contract.

Now we respectfully ask the Court to consider, that its own language in giving its reasons for adopting the above law states a very different case as making out a tort. We desire to quote it:

> "A company is chartered to construct and operate a railroad. Proceeding thereunder it constructs and operates its road. Nothing may be said in the charter in reference to the manner in which the road shall be operated, or the particular acts which it must do. Yet without any such specification it is under an implied obligation to exercise reasonable care in both construction and operation. If from undue speed, failure to give proper warning or other like acts or omissions individuals are injured, they may recover for such injury and their actions to recover sound in tort. Doubtless in the same transaction there may be negligence and breach of contract."

Is this not a clear definition of a tort, and in striking contrast with the cause of action set up in Fisher's Case, which the Supreme Court of North Carolina said in Gorrell's Case depended upon whether there was a breach of the contract? We repeat the opinion's language:

> "Yet without any such specifications in the contract or charter, it is under an implied obligation," etc.

We do not fear for one minute to add, "Yet with and without any such specifications," (in the contract or charter) for, of course, if the law is broken, the fact that also a specification in the contract is broken, does not make it any the less a broken law, and for all broken law, whether statute or common law, any breach of the law governing the relations of the parties, which law they must carry with them as part of the constitution of their being, there is an action for damages in tort. But if the obligation be found only in the words of the contract itself, then to sue for that breach of contract in the form of an action in tort, does not enable the plaintiff either to add an additional party to his action, whom he could not have made a party, upon his action of contract, nor does it give him a right to a preference under a law, which says this preference is to become such upon a judgment for a tort committed, not a judgment for an act committed, which is a mere breach of a contract, but is alleged as a tort.

In the repeated language of the Judges quoted in the cases above cited, we ask, "where is the common law of this land or the statute law of this land or any moral or legal obligation whatever on the part of the defendent water company in these actions to live up to these specifications set in the declaration in Fisher's Case appearing in this Record?" Of course, it is the breaches specified, to support which evidence is produced, that makes up the action; not a general allegation of obligations and negligence about them, which the Court can give effect to. The contract annexed to the Fisher declaration, which is the obligation or law governing the parties, said that "the works should throw six streams of water from six hydrants to a vertical height of one hundred feet in still air, etc." (See Contract, Record, 27?.) When the declaration says that "the defendant Company was culpably negligent, and wilfully careless of its duties and obligations both to the city of Greensboro and its inhabitants under the contract, and by virtue also of the duties, obligations and responsibilities, which it assumed when it undertook to supply water

to the city of Greensboro and its inhabitants for a stipulated price," does it say anything more, than that it violated the obligations of its contract? And the breach specified, we repeat, not the general allegations of the declaration, referred to the contract as always and ever the origin and measure of the obligation. Now this does not for one minute controvert the old and well-known rule of law, hitherto laid down, (and to which we respectfully submit, the language of this decision could only have been understood to apply up to the time of this decision,) that for any negligence in performing this contract, by which any person was injured, the defendant, a party to the contract, could have been sued in tort. But this negligence, as has been said again and again, must be not the omission to live up to the obligations of the contract, but the breach of the law which surrounds the parties, whether such law is set out in the contract or not. Many illustrations of this must come instantly to the mind of the reader. If the water company by the bursting of rotten hose, had killed or injured a bystander, it would have been liable in tort, not because the contract required strong and sound hose, but because it was bound to provide and use its own hose, to use and utilize its contract, or any property it possessed without such negligence as to injure another. To use the decision's own illustration, a man is not bound to build a house, but if he builds a house and puts in rotten rafters upon which any person, directly or indirectly invited by him, treads and falls to his injury, he is liable in tort, "with or without the specifications in the contract" of a requirement to provide sound rafters. In a word, the opinion produces its widely fatal results to legitimate investors in plants, whose beneficence and desirability, whether operated by cities or private water companies, is certainly recognizable, because it has added a new definition to the thing called "tort," so as to include rights of action hitherto recognized as plainly arising out of contract, viz: the breach of an obligation, which, except for the fact that it is set out in the contract, would not be a breach of the laws

of our being and existence, whether as natural or artifical persons, viz: would not be a breach of the law of the land, common or statute, or of those plain principles of right universally recognized as rules of public policy.

If it be said, that the alternative presented to the Court, is to ruin these companies, municipal or private, or to allow the public to suffer great or unlimited damage or inconvenience by their failure to live up to the obligation of their contract or franchises, and that the Court prefers the first horn of this dilemma, we reply, there is no such dilemma. We do not refer to the fact, that all civilized people protect themselves against this danger or inconvenience by insurance, the premiums on which, are a less price to the public than the total ruin of the municipal or private water companies, but to the fact, that the public has always its right of visitation and forfeiture of franchises, by action of Legislature or of the Court, as it may be stipulated, in the Charter, contract, or other grant of franchise.

This contract here provided with particularly in section 3 (Record, page 271) that all questions "in regard to the supply of water or the quality or quantity thereof should be arbitrated," and "either party shall have the right to have the award specifically performed in a Court of Equity or other appropriate judicial tribunal, and a failure to perform such award in a reasonable time by the aforesaid grantee shall work a forfeiture of rights under the ordinance." This was the agreed remedy for the protection of the public. Yet the decision in this case substitutes in the place of this agreement, for the protection of the public, the right to an action for tort, as the protection of the public from the failure on the part of the Company to keep its contractual obligations, which the decision itself says was no obligation of any sort until the contract was accepted between the parties in act and fact.

We repeat again, however, the consequences of ruin might well justify our asking this Court, so nearly divided on this

subject, to pause, before extending the definition so as to include this new class of torts.

Respectfully submitted,

JOHN PEIRCE BRUNS,
WM. P. BYNUM, JR.,
ARCHIBALD H. TAYLOR,
For Petitioners.

We, John Peirce Bruns, Wm. P. Bynum, Jr., and Archibald H. Taylor, for petitioners herein, do hereby certify that in our judgment the foregoing petition for a re-hearing is well founded and that the same is not interposed for delay.

JOHN PEIRCE BRUNS,
W. P. BYNUM, JR.,
ARCHIBALD H. TAYLOR.

FILE COPY.

FILED
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 75.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, PETITIONERS,

vs.

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF OF COUNSEL FOR RESPONDENTS.

AUBREY L. BROOKS,
Solicitor for Respondents.

SUPREME COURT OF THE UNITED STATES

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On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

This cause comes up to the Supreme Court of the United States upon a certificate from the United States Circuit Court of Appeals, Fourth Circuit, under the provisions of an Act of Congress approved March 3, 1891.

The certified questions of law and the purposes therefor, are stated in the Certificate of the Court of Appeals, filed August 8, 1904, to be as follows, to-wit:

"This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions aris-

ing from the record, and the doubt which the court has as to the correct decision thereof, that three questions raised on said appeal be certified to the Supreme Court of the United States for its consideration thereof; and that accompanying said questions, there shall be certified a statement from which such questions can be understood; which statement and questions are as follows:

QUESTIONS.

First. Whether the fact, that under the decision of the Supreme Court of North Carolina, an action can be and is maintained, by a citizen and tax-payer of the State, against a water company organized under the laws of the State, contracting with the city, (of which city said citizen is a tax-payer and inhabitant) to furnish the city and its inhabitants with water for domestic and public purposes, and also for the purpose of extinguishing fire, for damages occassioned by the burning of the building within the city belonging to such citizen and tax-payer, because of the alleged negligent failure to supply and furnish sufficient water and pressure from its engines and pumps to extiguish fires, the Circuit Court of the United States, sitting in equity in such case, in a suit for foreclosure of a mortgage given by the water company, should recognize the existence of such cause of action, and whether or not it is concluded by the rendition of a final judgment in the State Court in favor of the persons whose property has been destroyed by fire.

Second. Whether, because in said suit it was determined by the Supreme Court of the State that the judgment in such action was based upon a cause of action declared upon in tort, and not in contract, said Circuit Court of the United States is bound, and cannot for itself determine the question of whether the cause of action, if existing at all, was one arising in tort, or contract?

Third. Whether, assuming the existence of such cause of action, and that the same may be maintained in tort, a final judgment in such case against the water company obtained in the courts of North Carolina, is protected by section 1255 of the Code of that State, and should have priority in the distribution of the assets of the water company over its mortgage bonds theretofore issued".

Upon motion of appellants the Court on October 16th, 1905, granted a writ of certiorari directing that the entire record be sent up, which was accordingly done.

STATEMENT OF FACTS.

The questions presented arise upon a bill of foreclosure of a mortgage filed by the Guardian Trust and Deposit Company against the Greensboro Water Supply Company on the 29th day of September, 1900, in the Circuit Court of the U. S., for the Western District of North Carolina, the complainant as trustee holding certain bonds of the defendant company secured by a mortgage of the property, plant and franchise of the defendant company subordinate in lien to a mortgage executed upon the same property, plant and franchise by the Greensboro Water Company. A receiver having been appointed for the mortgaged property, a contract was entered into between the receiver and the City Council of Greensboro looking to the purchase of all the mortgaged property at private sale for the sum of seventy-five thousand dollars ($75,000.00). Upon applying to the Court for the approval and confirmation of this sale, it appeared that the Guardian Trust and Deposit Company of Philadelphia, trustee, holding the mortgage securing the fifty thousand dollars ($50,000.00) of bonds of the Greensboro Water Company, was a necessary party before such sale could be confirmed, an order was entered making this last named trustee a party. On its appearing and with its assent the proposed sale was approved and confirmed, the money derived therefrom to stand in the place of the property in all respects and to be subject to the further order of the Court. The bondholders and judgment creditors are contesting the question of the priority of payment of this fund, the amount being insufficient to pay all creditors.

ORGANIZATION OF THE GREENSBORO WATER COMPANY, ETC.

In 1887 a water company was organized in Greensboro, N. C., whose corporate purpose was to furnish that city and its inhabitants with water for domestic, sanitary and fire purposes. On the 29th day of December of that year the articles of agreement and letters of incorporation were filed with the Clerk of the Superior Court of Guilford County, in which Greensboro was, and the name of the "Greensboro Water Company" was given to the corporation. These articles and letters were amended and ratified by the General Assembly of North Carolina on March 3d, 1891, Private Laws of North Carolina, Chapter 166, pages 1009 and 1010. Very soon after its incorporation in 1887 the Greens-

boro Water Company secured the passage of an ordinance by the City of Greensboro under which it obtained a franchise and rights to the exclusive use of the streets, side-walks and public grounds for the purpose of constructing, operating and maintaining a complete system of water works. At the same time it obtained an agreement from the city to pay annually, for a term of years, money to the said company in consideration of the supply by the said company of hydrants in various parts of the city with an adequate water presure at all times to extinguish fire, and to keep its tower, reservoir, etc., supplied with water day and night, so as secure to the city and its inhabitants protection against fire.

After this contract was made the Greensboro Water Company exeuted a deed of trust to the Guardian Trust and Deposit Company of Philadelphia to secure the payment of bonds aggregating fifty thousand dollars, ($50,000.00) the deed covering all of its property and plant including the rights acquired by and under this said contract, and on the first day of May, 1891, the Greensboro Water Company executed a second deed of trust upon its plant to R. R. King and A. H. Taylor to secure a second bond issue of twenty thousand dollars ($20,000.00). In 1892 a bill was filed in the United States Circuit Court at Greensboro by J. W. Middendorf, et al. on behalf of holders of the bonds secured by a second mortgage and also as representatives of holders of bonds under the first mortgage against the Greensboro Water Company, seeking the appointment of receiver and praying for a sale of the property. The rights, status and wishes of the bondholders of the first mortgage is fully set out in paragraph six of said bill as appears upon pages 191 and 192 of the Record, to-wit:

"And your orators further aver that the only material and substantial interest in the property of the said defendant company other than the lien of the second said mortgage bond holders is the lien held upon the same by the said first mortgage bondholders hereinbefore referred to which are owned and held ten thousand dollars ($10,000.00) thereof by your orator, William C. Seddon, and fifteen thousand dollars (15,000.00) thereof by your orators, Jno. S. Gittings and Company, and twenty-five thosand dollars ($25,000.00) by persons for whom your orators Jno. S. Gittings and Company, are bankers and attorneys in fact, and entitled to represent and bind said owners in respect to said bonds, and, therefore, it is within the knowledge and power of your orators to aver in behalf of all said first mortgage bond-

holders, and they do aver, that they deem it for their interest and advantage, and assent to the appointing by this court of a receiver for the property of said defendant company as hereinbefore prayed and to a decree for the sale of the said property subject to the lien of the first mortgage under which said first mortgage bonds are secured".

A receiver, Jas. D. Glenn, was appointed to manage the property, but in 1895, under a decree of the Court, R. R. King and A. H. Taylor were appointed commissioners to sell the property, which sale took place on April 30, 1896.

At this sale Hugh L. Pope became the purchaser under an agreement had between all the bond holders, and all the parties interested made before the day of sale, Pope acting as the agent of all parties as appears from the testimony of A.H. Taylor, who was a stockholder in both the new and old companies, and also attorney and solicitor for the creditors and bond holders of the old Greensboro Water Company and one of the promoters of the re-organization scheme, who says: (See Record, page 93).

"The arrangement was really made prior to the sale. The holders of all of the securities of the old company, said, 'we will purchase or agree' (I was one of them to a small extent) 'agree to bid for the property through our agent, Mr. H. L. Pope, and to deliver to him all of the securities of the old company' so that he could, if necessary, bid up to the full amount of the stock and bonded indebtedness of the old company without paying cash, but, as I have said, there was a certain amount of cash which had to be paid before the holders of the securities of the old company could use them in payment for the property, and the understanding was that the cash which was advanced by various parties should be repaid in bonds of the new company of a prior lien to those given to the holders of the original securities of the Greensboro Water Company. That was the general plan of the organization. Of course there was a general understanding about it prior to the sale itself. It was carried out after the sale as near as possible"

ORGANIZATION OF THE GREENSBORO WATER SUPPLY COMPANY.

Conveyance having been made to Pope he at once conveyed the plant and all the property purchased to a corporation then and there formed, named the "Greensboro Water Supply Company". The conveyance to Pope and his re-conveyance to the new

company were expressly declared to be subject to the mortgage held by the Guardian Trust and Deposit Company of Philadelphia for fifty thousand dollars ($50,000.00).

Among the property conveyed in the deed of these commissioners, and also in the deed of Hugh L. Pope, was the contract for furnishing the city with water as above stated, and, of course, the franchise, under which the contract was made, (see provisions of deed from commissioners to Hugh L. Pope on page 117 of Record) and contract with the city, which was approved by the Court (see Record, page 203).

"Said Water Company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in construction or in operation of the plant."

This contract having been so purchased and conveyed to the Greensboro Water Supply Company, this company assumed the same, and thence forward conducted its operations under its provisions, receiving the tolls from the city and from its inhabitants, and from these sources, principally paying the interest on the fifty thousand dollar first mortgage bonds.

On July 1st., 1896, the Greensboro Water Supply Company executed a deed of trust upon all its property, including the franchise, to the Guardian Security and Deposit Company of Baltimore, Md., to secure the payments of bonds to the amount of one hundred and ten thousand dollas ($110,000.00) in two series; the first series of eighty bonds known as esries A, and the other thirty as series B. Of series A. bonds to the amount of fifty thousand dollars was set apart to meet the fifty thousand dollar first mortgage bonds, as the conveyance was expressly said to have been made subject to this lien. The original first mortgage bonds, however, have never been retired.

CAUSES OF ACTION AROSE PRIOR TO FILING OF BILL, ETC.

Anterior to th filing of this bill in the month of June, 1897, two buildings in the City of Greensboro, with stocks of goods therein, were destroyed by fire. One of these buildings was owned by Charlotte Gorrell and the stock of goods therein by A. A. Hinkle, who had, prior to the fire, made an assignment to A. M. Scales. The other building was owned by Helen G. Browne and the goods therein by Hodgin, Pegram & Company,

who, after the fire, assigned all their interest to A. M. Scales. In the month of August, 1897, Helen G. Browne and A. M. Scales, assignee, instituted several suits, because of these fires, in the Superior Court of Guilford County, against the Greensboro Water Supply Company.

On the 17th. of June, 1899, another fire occurred in Greensboro, in which the property of B. J. Fisher, known as the Benbow Hotel, was partially destroyed by fire. On the 20th. day of July, 1899, Fisher also instituted suit against the Greensboro Water Supply Company because of this fire.

These cases were pending when the receiver was appointed for the Greensboro Water Supply Company, the answer having already been filed in the Fisher case, the receiver filing the answers in the Scales cases. (The receiver was also counsel for defendant company in all the cases).

At the ensuing Janaury term of the Superior Court of Guilford County the cases were heard and the issues submitted to the jury. In the several cases they found for the plaintiff, that is to say, for Fisher, twenty-five thousand dollars (25,000.00); for Scales, assignee of Hinekle Bros., thirty-two hundred dollars ($3,200.00); for Scales, assignee of Hodgin, Pegram & Company, eighteen hundred dollars ($1,800.00); and for Helen G. Browne, three thousand dollars ($3,000.00). Thereupon the plaintiff in each case submitted to the Court an order for judgment, in which, after reciting the issues found by the jury, it proceeds:

"It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff recover of the defendant.....dollars damage *for the injury and damage done him by the negligence of the defendant*, and the cost of this action".

The Court refused to sign the judgment thus tendered because of the words italicized. An appeal was taken to the Supreme Court of North Carolina, and on hearing, the action of the lower Court in refusing to sign the judgment was held error, that the action was brought and properly brought in tort. This decision was filed in the Fisher case (128 North Carolina 375). Thereupon the appeals were withdrawn in the other cases, the Fisher decision having been agreed by all parties to settle the question.

The Code of North Carolina of 1883, Section 1255, governing this question, is in these words:

the United States as they have by *law* or *usage* in the Courts of the State from whence the said records are or shall be taken".

Mr. Justice Story in the leading case of Mills vs. Duryee, 7th. Cranch, 484, says, "It is argued that this Act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admited. This argumnt cannot be supported. The Act declares that the record duly authenticated shall have such faith and credit as it *has in the State Court from whence it is taken.* If in such Court it has the faith and credit of evidence of the highest nature, viz: record evidence, it must have the same faith and credit in every other Court. Congress has, therefore, declared the effect of the record by declaring what faith and credit shall be given to it. When Congress gave the effect of a record to a judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the Act and such proof is of as high a nature as an inspection by the Court of its own record, or as an exemplification would be in any other Court of the same State"

"The last objection is, that the Act does not apply to Courts of this District. The words of the Act afford a decisive answer for they extend to "every Court within the United States". Were the construction contended for by the plaintiff in error to prevail, the judgments of the State Courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgment precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the Act of Congress unless it declares a judgment conclusive when a Court of the particular State where it is rendered would pronounce the same decision".

In a later case of Hampton vs. McConnell, reported in 3rd. Wheaton, page 234, Chief Justice Marshall, speaking of the above case delivers this short and conclusive opinion:

"This is precisely the same case as that of Mills vs. Duryee. The Court cannot distinguish the two cases. The doctrine there held was, that a judgment of a State Court should have the same *credit, validity and effect*, in every other Court in the United States, which it had in the State where it was pronounced, and

that whatever pleas would be good to a suit thereon in such State and none others could be pleaded in any other Court in the United States".

In the case of Crapo vs. Kelly, 16th. Wallace, page 610, the Court having under discussion the question of the faith and credit to be given a State Judgment declaring a lien upon a ship, in commenting upon the case of Mills vs. Duryee, say:

"Congress say the Court in that case, have declared the effect by declaring what faith and credit shall be given to the proceedings, so that it only remains, in every case, to enquire what is the *effect* of a judgment in the State Court where it is rendered. If a judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere in the Courts of the United States".

Christmas vs. Russell, 5th. Wall, 302.

Justice Gray, in Hanley vs. Donoghue, 116 U. S., page 1, discussing the effect of State Judgments when offered for proof in other Courts says:

"Judgments recovered in one State of the Union when proved in the Courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being *re-examinable upon the merits* nor impeachable for fraud in obtaining them if rendered by a Court having jurisdiction of the cause and of the parties".

McElmoyle vs. Cohen, 13 Pet. 312-324.

Thompson vs. Whitman, 18 Wall, 457.

In the last case cited, Mr. Justice Bradley, in discussing this question and the Act of Congress, says:

"It has been supposed that this Act in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered".

And commenting upon the case of Mills vs. Duryee, continues:

"This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction".

Mr. Justice Story, who wrote the opinion of the Court in Mills vs. Duryee, in his commentaries on the Conflict of Laws in discussing the wisdom of this rule of law which give to foreign

judgments full faith and credit, uses the following language which is quoted with approval in the case of Hilton vs. Guyot, 159 U. S. by Mr. Justice Gray.

"It is, indeed, very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the Court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. *Suppose a case purely sounding in damages*, such as anaction for assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the Court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed ex æquo et bono? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence or upon foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be prima facie evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial".

The judgment of a state court of Pennsylvania was held to be *res judicata* in a case in which a former judgment, the other way had been rendered in the United States Court in a case in which the same persons were parties, and this notwithstanding the fact that the Supreme Court of the United States says of the case in the state court:

"Such procedure, though not authorized by the practice of the Federal Courts, will be respected when the question arises upon the effect to be given to the Judgment".

Bryar vs. Campbell, 177 U. S. 648.

"If a Maryland court had jurisdiction to award judgment, it is valid and entitled to the same full faith and credit in North Carolina, that it has in Maryland as a valid domestic judgment".

Harriss vs. Baulk, 198 U. S. 215

"The judgment of a state court has the same effect, credit and validity that it has in the state where rendered and no more".

Hampton vs. McCall, 16 U. S. 3 Wheat. 234.
Mahue vs. Thatcher, 6 Wheat, 129.

In the last cited case Judge Marshall delivering the opinion of the Court said:

"That as by the local laws of Lousiana, questions of fact in civil cases were tried by the court, unless either of the parties demanded a jury, the interest upón the original judgment in Massachusetts might be computed and made a part of the judgment of Lousiana witout a writ of inquiry and the intervention of a jury, and that although the original suit was commenced by an attachment yet the defendant Mahue had personal notice of the suit and afterwards appeared and made defence, so that even supposing that there was any objection to the proceeding by attachment it was cured by the appearance of the defendant and his litigating the suit".

This court after quoting the provision of the Constitution of the United States, to the effect that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the Act of Congress passed to carry out that provision, says:

"The legislation of Congress amounts to this: That the Judgment of another state shall be record evidence of the demand, and that the defendant, when suing on the judgment can not go behind it to controvert the contract or other cause of action on which the judgment is founded; that it is evidence of the established demand, which, standing alone is conclusive between the parties to it".

The President and Directors of the Bank of the State of Alabama vs. Dalton., 9 How. 528.

The case of the Board of Public Works of Virginia vs. the Columbia College, 17 Wal. 521, was a case in which a party relied upon a judgment in the state court, which judgment it had been held by the court in the state in which it was rendered was merely interlocutory and not final. The Supreme Court of the United States held at page 691 as follows:

"At any rate, the complainant relying upon the decree of the court as evidence of his demand against Withers, invoking for it full faith and credit under the clause of the Constitution, can not object to the character which the highest court of Virginia and in other states, than the state in which the judgment is rention or weight. No greater effect can be given to any judgment of a court of one state, in any other state, than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on this subject".

The converse of this proposition follows; that the same faith, credit and effect shall be given in the courts of the United States and in other states than the state in which the judgment is rendered, as is given to it by the courts of the state in which the judgment was had.

It is sought, by those who oppose the claims of the intervenors in this case, to make the case turn upon the question as to whether the United States Courts would be bound by the decisions of the state courts, if relied on as precedents, as to general questions of law not affecting the construction of Statutes, or provisions of the Constitution of the state rendering the decision. This point cannot be raised in this case for the reason that the judgments of the intervenors are not relied on merely as precedents, and persuasive authority in the United States courts, but they are *res judicata* of all matters decided in these cases, or which should have been pleaded and passed upon in the state court.

The attack upon the judgments of the intervenors in this case is purely collateral. The distinction between the decision of a state court relied upon merely as a precedent, and a judgment relied upon as being *res judicata* of all matters determined by the state court, is that in the former instance the courts of other states than that in which the judgment is rendered, and of the

United States, will follow them if they are construing state constitutions or laws of the state in which the judgment was rendered, or if the reasoning of the court commends itself to the court in which the judgments and decisions are cited, and in the later instance the judgments will be followed without regard to whether they are based upon sound principal, or whether there are apparent errors in the decision, if the court rendering the judgment and jurisdiction of the proceedings.

In the case of Chicago & Alton Railway Company vs. Wiggins Ferry Company, 108 U. S. 18, a suit had been brought by the Ferry Company against the Chicago & Alton Railway Company on account of the latter not exclusively patronizing the former's ferry across the Mississippi River at St. Louis, under an alleged agreement that it would do so. A judgment had been rendered in favor of the ferry company. In a subsequent suit between the same parties it was contended by the Railroad Company that the right of the Railroad Company to refuse to patronize the Wiggins Ferry Company was an open question. The judgment previously rendered was set up by the Ferry Company as an estoppel. The railroad thereupon applied to the state court for removal of the case to the federal court upon the ground that due faith and credit was not being given to the laws of Illinois where the ferry company was chartered and the case was ordered removed. The Circuit Court of the United States remanded the cause to the state court and there was an appeal to the Supreme Court of the United States and this court said:

"'In our opinion this is not a suit arising under the Constitution or laws of the United States, within the meaning of that term as used in the Removal Act. If the courts of Missouri gave a wrong construction to the laws of Illinois in the judgment set up as an estoppel, that error cannot be corrected by the means of a transfer of this suit from the state court to the Circuit Court of the United States. So long as a judgment stands, it cannot be impeached collaterly in the courts of the United States, any more than those of the state, by showing that if due effect had been given to th laws it would have been the other way. If it has the effect of an estoppel as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The court of the United States must give it the same effect as a judgment that it has in the court of the state. Whether as a judgment it operates as an estoppel, does not depend on the Consti-

tution or Laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the constitution or laws of the United States, but on the effect of the judgment under the laws of Missouri. The Public Acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court in the judgment which has been rendered, that may entitle the Railroad Company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made".

There is an exhaustive note in the case of Kansas City Ft. S & M. R. Co. vs. Morgan in 21 C. C. A., page 478 citing many authorities sustaining the position taken by the intervenors herein.

Under the head of "*res judicata* as between federal and state courts," on page 480, the following language is used:

"It is now firmly settled that judgments of a superior court of record of several states are binding and conclusive in the federal courts when made a basis of *claim* or *defense*. That is to say such a judgment when pleaded in the federal court, is a bar to any other litigation of the same cause of action between the same parties, or, *as evidence*, it is conclusive upon parties and privies of all issues properly raised and determined in state court; and while the jurisdiction of the court which rendered the judgment may be challenged and inquired into, there can be no re-examination of the merits of the controversy if the court had jurisdiction of the parties and subject matter".

This proposition is sustained by numerous authorities cited. On page 482 it is stated:

"That a judgment of a state court set up as an estoppel cannot be corrected in a collateral proceeding in the court of the United States though the proceeding on which it is based may have been irregular. Although the judgment may be esteemed erroneous in law, these circumstances do not affect its conclusiveness. Until it is reversed or brought up for review in the manner provided by law it is entitled to the same effect in the federal courts as in the courts of the state".

If the decision of the Supreme Court of North Carolina in cases by the intervenors against the Greensboro Water Supply Company is to remain in force unless reversed for error in a direct proceeding, and cannot be collaterally attacked, then it is

res judicata that the intervenors are judgment creditors, regularly obtained upon a cause of action *ex delicto*, and they are entitled to whatever advantages accrue to such creditors of said corporation.

The fact that the bond holders are incidently affected by the character of this judgment can in no sense avoid the judgment. Of necessity every creditor of the common debtor is to some extent affected by the judgments held by the intervenors, but this is not a reason for failure to extend faith and credit to the judgments obtained as these were.

These judgments in favor of the intervenors in this case, therefore, stand upon the same footing as would a judgment obtained for negligence resulting from personal injury to one of the employees of the Greensboro Water Supply Company, or like judgments against a Railroad Company.

Chief Justice Fuller, speaking for the Circuit Court in the case of the Southern Railroad Company against Bouknight, reported in 70th. Fed. Rep., page 442, very clearly states the rule governing judgment creditors "filing claims for priority of payment over mortgage creditors" in cases like this to be:

"The judgment roll showed the date of suit brought, *the cause of action*, and when it arose, and the amount of the damages. The mortgagee was not, and could not have been made a party to that action at law; nor is this intervention a proceeding against the mortgagee to recover over in personam. To what extent third parties may go in impeaching judgments collaterally need not be discussed. There is no pretense here of want of jurisdiction, or of fraud, collusion, or gross neglect in obtaining the judgment, or of any irregularity invalidating it. The only way in which the judgment was questioned was by exceptions to the master's report, which raised objections to its admission in evidence, to its sufficiency as proof of the allegations of the petition to the award of priority, and that the master erred in not reporting that Bouknight, on the face of his petition, was guilty of contributory negligence, and not entitled to recover. The date of the mortgage appearing, the judgment record was sufficient to make out petitioner's case, if admissible in evidence; and we are clear that it was admissable under the statute, not simply as establishing the fact of its rendition, but as proof of when the action was brought, *what for*, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than prima facie against the mortgagee in respect of them, and that is enough to dispose of the inquiry here".

In the case of Central Trust Company against Charlotte C. & A. R. Co., reported in 65 F. R., Simonton, Circuit Judge, discussing the faith and effect which should be given to a judgment of a State Court presented to the United States Court for priority of payment over the assets of an insolvent corporation, says:

"His second proposition is that this judgment is res inter alios acta, and can be challenged by those claiming under the mortgage. The cause of action upon which this judgment was had was cognizable only in a court of law. The proceeding were in a court of law. To these proceedings the mortgage trustees were not only not necessary parties; they would have been improperly made parties, and the joinder would have been demurrable. When the mortgagees took this mortgage, they did so with notice *of the priority of this kind of judgment*, obtainable only in this way,—a way in which they could not be parties,—and with that notice and its consequences they accepted the mortgage. But this does not deprive the mortgage creditor of his property without due process of law. When, in marshaling the assets of this insolvent railroad company, the mortgage creditors and those claiming through them are met by this judgment and its claim to priority, they have the right to examine it, to look into the cause of action, to ascertain when and where the action was brought, to know if the conditions of the law existing when their mortgage was executed have all been complied with. They have the right to inquire into the jurisdiction of the court, and, above all, they are entitled to know that there was no fraud or collusion or gross neglect in obtaining the judgment. But, when all these are established, this judgment, when duly pleaded and proved in the court of the United States sitting in South Carolina, has the effect, not only of prima facie evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it force and effect in this respect, which it has in the state in which it was rendered, denies the jdgment creditor a right secured to him by the constitution and laws of the United States.

Huntington vs. Attrill, 146 U. S. 685-686 13 Sup. Ct. 224.

"The judgment of the state court is produced in these proceedings, not in order to establish a demand against the mortgagees or their property, or to assail the validity of their mortgage, but for the purpose of showing that the claim of the petitioner comes

within the protection of the South Carolina statute. It is entitled to full faith and credit".

Petitioners in their contention that the United States Court should re-examine the cause of action upon which the intervenor's judgments were obtained, rely entirely upon the case of Hassell vs. Wilcox, 130 U. S., 493, and a few other cases in some of the circuits based upon the Wilcox case. A sufficient answer, however, to these citations and to this argument, will be found in a discussion of this case by Chief Justice Fuller in Southern Railway Company vs. Bouknight, supra, where this learned Judge says:

"In Hassell vs. Wilcox, 130 U. S., 493, 9 Sup. Ct. 590, the judgment in controversy was rendered on a complaint, counting on a note, the consideration of which appeared on its face to be in part for services which were not, and in part for labor claims which were,, entitled to preference under the statute of Texas involved in the case; and, this being so, it was held by the Supreme Court that the bondholders had the right to compel the plaintiff to prove affirmatively the amount for which he was entitled to a lien. *The case is peculiar*, and does not rule the point before us".

"The case is peculiar" and differs from the question at bar in other respects. For instance, the bondholders contested the judgment upon the grounds: First, that it was obtained by fraud and collusion between Wilcox and the president of the Company. Second, that the note upon which the judgment was rendered was without consideration and fraudulent. Third, that Wilcox falsely represented to the District Court that the note was for services and for amounts advanced which were entitled to priority as a lien, when, in fact, upon the face of it, the contrary appeared. And it further appears from a perusal of this case that Wilcox did not rely upon his judgment, but introduced evidence before the Master and demonstrated the falsity of his own judgment. Certainly no opinion upon this state of facts can be held to be conclusive upon the case at bar.

Against the judgments offered by the intervenors here there is no pretense of want of jurisdiction, or of fraud, collusion or gross neglect in obtaining the judgment, or of any irregularity invalidating it. Indeed, it appears affirmatively from the Record, that the receiver of the United States Court in the main cause appeared in the State Court and filed answers to the actions upon which these judgments were rendered. That the

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the Courts of the State against such incorporations, for labor performed (nor for material furnished such incorporation) nor for torts committed by such incorporation, its agents or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This section has been amended so as to eliminate the sentence in brackets. This section gives priority to judgments obtained against the corporation in preference to the lien of all mortgages against its property and earnings. In the case at bar there are two classes of mortgages; one class is a mortgage executed by the Greensboro Water Company, which has been *assumed* by the purchasing company, and the interest upon its bonds paid out of the earnings of said company, and the other is a mortgage executed by the Greensboro Water Supply Company, the successor of the Greensboro Water Company.

In the main case the Master was thereafter instructed to call in creditors, the bondholders coming in to prove their deeds of trust and their bonds.

Notices having been served on B. J. Fisher et al., judgment claimants, otherwise called intervenors, they severally filed their answers, together with proof of claims before the Standing Master, as set out in the Record.

Upon all the pleadings, petitions, papers, the testimony and proofs taken before the Master, and his report, the cause was set down for hearing before their Honors, Simonton, Circuit Judge, and Boyd, District Judge, at Greensboro. The said cause having been fully argued by counsel both for complainants and defendant respondents,—and the intervenors, the Court, upon due consideration, on the 24th. day of March, 1902, entered a decree giving priority of payment to the judgments of B. J. Fisher et al., appellees herein, over the bondholders, out of the fund in the custody of the Court arising from the sale of the property of the Greensboro Water Supply Company, upon the grounds, and for the reasons, stated in the opinion of the Court, as set out in the Record at pages 385 to 394 inclusive, from which decrees the Guardian Trust and Deposit Company, the complainants in the bill, and the Guarantee

Trust and Deposit Company, respondents, appealed to the Circuit Court, at Richmond, Va., where this cause was twice argued, and the Court being unable to determine the matters in controversy certified the foregoing questions.

ARGUMENT.

The central matter in dispute and to settle which these three questions have been certified by the United States Circuit Court to this Court for answer may be thus briefly stated:

The United States Circuit Court sitting in equity at Greensboro, North Carolina, now holds for distribution among creditors seventy-five thousand dollars ($75,000.00) in money derived from the sale of the plant and franchise of the Greensboro Water Supply Company.

The intervenors presented to the Court for payment their judgments set out in the Record duly authenticated and affirmed by the Supreme Court of North Carolina. *They are judgments in tort.* The Court below desires to know what faith and credit shall be given these judgments. The bondholders who oppose their payment contend that these judgments are not conclusive and that the facts upon which they were rendered may be re-examined by this Court.

We respectfully submit that the judgments here presented are not only decisive of the matters about which they purport to speak, but have the sanction and approval of the highest Court of the State of North Carolina, and as such are entitled to full faith and credit, when presented to the United States Court for payment.

The decisions of this Court, based upon the Constitution and Acts of Congress, we think are uniform and conclusive upon this question.

By the Constitution of the United States it is declared that "full faith and credit shall be given in each state to the Public Acts, records, and judicial proceedings of every other state; and Congress may, by general laws, prescribe the manner in which such Acts, records and proceedings shall be proved and the effect thereof". By the Act of May 26, 1790, Congress provided the mode of authenticating the records and judicial proceedings of the State Courts, and expressly declared "that the records and judicial proceedings authenticated, as aforesaid, shall have such faith and credit given to them in every Court within

As has been so tersely stated by the Supreme Court of North Carolina in Railroad vs. Bennett, 123 N. C., 214.

"The mortgagee always has the power to protect himself against such claims if he chooses to do so by foreclosing the mortgage, or by taking the property into possession, or by having a receiver appointed, and when the mortgagee is getting a part of the earnings by way of interest or otherwise, and prefers to allow the mortgagor to remain in possession and to run the concern, he must take the risk of such liability."

The same construction has been repeatedly given to like statutes by the Supreme Court of the United States.

Brine vs. Hartford Fire Insurance Co., 96 U. S., 364.

Connecticut Mutual Insurance Company vs. Cushman, 108 U. S., 51.

Providence Insurance for Savings vs. Jersey City, 113 U. S., 506.

Toledo D. & B. Railroad Co. vs. Hamilton, 134 U. S., 30.

The rights of tort judgment creditors to the protection given in this statute have been frequently passed upon by the Supreme Court of North Carolina in recent decisions, and in every instance the statute has been upheld and the relief therein afforded granted.

Coal Co. vs. Electric Light Co., supra.
Lanston vs. Improvement Co., 120 N. C., 132.
R. R. Co. vs. Burnett, 123 N. C., 214.

In the last named case the Court, referring to the opinions in the last two preceding cases cited, says:

"These opinions are expressly put upon the ground that the mortgages were void as to such claims, and the property stood, so far as such claims were concerned, just as if no mortgage had been made. If this were not so this statute would be a false light held out to such claimant, thinking they had a security when in fact they had none. The Legislature never so intended and we so hold."

We submit that under the statute (Section 1255 of the Code) corporate property embraced in the merger, into whosesoever hands it may come, constitutes a trust fund for the payment of judgments which may be obtained for injury to person or prop-

erty, although the injury may have been caused by the lessor, or the lessee of such property, and more particularly by the successor of the corporation having made the mortgage. Otherwise, the object of the statute could easily be defeated by an agreement between the mortgagor and the trustee and the beneficiaries of the trust, to exempt from the operation of such statute its property, in the interest of persons or mortgage creditors who might be declared to have a first lien upon such property.

It is contended that the property here mortgaged, which is included both in the first and second mortgages of the Greensboro Water Company, and likewise in the mortgage of the 1st. of July, 1896, of the Greensboro Water Supply Company, is set apart by law for the satisfaction of tort judgments, obtained against persons operating and conducting such property thus embraced in said mortgages; and that all mortgages against said property are void as to such judgments, whether they be mortgages given directly by them, or mortgages the payment of which they have assumed by reason of the purchase and consent of mortgagees; that the bondholders are affected with notice of this statute as much so as if it was incorporated in totidem verbis in the mortgage under which they claim. It is a part of their contract and they are bound by it, and no agreement made by the bondholders whereby such property is undertaken to be removed from the operation of the statute is valid in law.

East Tenn., V. & G. R. Co., vs. Frazier, 139 U. S., 288.
Howe vs. Harper, 127 N. C., 356.

It is contended that any contract or understanding made or had by and between the bondholders of the Greensboro Water Company and the Greensboro Water Supply Company, or with the Guadian Trust and Deposit Company, whereby the statutory effect of the intervenor's judgments would be impaired by the lessening of the legal means of their enforcement, would be invalid, inasmuch as it would impair the obligation of the contract, and such an arrangement would be void in law.

U. S. vs. Mayor of New Orleans, 103 U. S. 358, 367.
Cooley's Const'l Limitations, 4th. Ed., 241.
Angel and Ames on Corporations, 7th. Ed., secs. 332 and 333.
Mount Pleasant vs. Beckwith, 100 U. S., 514, 528-29-30-34.

Swain vs. Seamans, 9th. Wallace, 274.

It is sumitted further that the bondholders having participated in the re-organization of the old Greensboro Water Company and merged it into a corporation known as the Greensboro Water Supply Company, and having agreed to the mortgage of July 1st., 1896, (wherein provision is made for the payment of the interest on the said bonds), that the mortgage of July 1st., 1896, is, in contemplation of law, a new mortgage and a waiver of the mortgage of May 10, 1888.

Cook on Stocks and Stockholders and Corporation Laws, 3d. Ed., Sec. 793, and cases cited.

Upon inspection of the judgment roll, it will be seen that these judgments are based upon a cause of action well-recognized by the law of the land, and in accordance with both English and American precedents. And, that the said causes of action are based upon a breach of duty implied and imposed by law, as well as arising from contract, and that the Intervenors had their election to sue in contract, or in *tort*. They chose the latter.

If it were proper for this court to go behind a judgment of the State Court for the purpose of ascertaining whether or not there was a cause of action stated, upon which the final judgment of the State Court was based, or for the purpose of determining by inspection of the judgment roll whether the proceedings in the cause and the complaint in the action show a cause of action, still we submit that this court would reach the same conclusion as did the Supreme Court of North Carolina and Judge Simonton, viz:

That the Intervenors had a cause of action, and that the said same is fully and comprehensively stated in the complaints filed in their said actions againust the Greensboro Water Supply Company as appears from paragraphs 6, 10, 13, 15, 16 and 19 of the complaint in the Fischer Case." (See Record, pages 264 and 269.)

Attention is called to the fact that technical and common law forms of actions are not recognized in the State of North Carolina; that distinctions betweens actions at law and suits in equity and the forms of all such actions are abolished, and there is but one form of action for the enforcement of private rights and the redress of private wrongs, and that action is

denominated a "civil action." (See Code of North Carolina, Section 133.)

"In jurisdiction where all forms of actions have been abolished the inquiry should be not as to the remedy formerly given at common law, but as to the real nature of the right."

Keener on quasi contract, 160.

The defendant Water Company is a *quasi public* corporation subject to the same rules of law as railroad, telegraph, and gas companies, and likewise liable to the public in the same manner to perform all duties imposed by the law upon such corporations.

Griffith *vs.* Water Co., 122 N. C., 206.

In Young *vs.* Telegraph Company, 107 N. C., 384 and 386, the Court says:

"We have no forms of action or technical rule which can prevent a plaintiff upon a statement of facts of his case from recovering all the damages shown to have been sustained. If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize an action *for tort* all the damages for the thing *done* or *omitted* either *ex contractu* or *ex delicto* may be recoverable in on action."

Chitty, in discussing actions on the case (form of action *ex delicto*) and of the injuries for which relief could be had under this form of action, says: "These injuries may be either by non feasance or the omission of an act which the defendant ought to perform, or by misfeasance, being the improper performance of an act which might lawfully be done, or by malfeasance, the doing what the defendant ought not to do, and these respective *torts* are commonly the performace or omission of such act contrary to the general obligation of the law, or the particular rights and duties of the parties or of some express or implied contract between them." Chitty on Pleadings, 11 American Edition, 133.

And in the same volume, at page 383, in stating the requirements of the declarations in actions for *torts*, Mr. Chitty says: "When the plaintiff's right consits in an obligation on the defendant to observe some particular duty the declaration must state the nature of that duty which, we have seen, may be founded either on a contract between parties, or on the

obligation of law arising out of the defendant's participation, character or situation."

The petitionerss in their Brief charge that this doctrine, when applied by the Supreme Court of North Carolina in the cases at bar is new and revolutionary. We beg to call the Court's attention to the case of Robinson *vs.* Threadgill, 35 N. C. 41, which was decided in 1851, in which, by a unanimous Court, the doctrine herein contended for was expressly declared to be the rule of law and action in such cases. Quoting from the opinion in this case:

"The rule is that where the law from a given statement of facts raises an obligation to do a particular act, and there is a breach of that obligation, and a consequent damage, an action on the case founded on *tort* is the proper action."

"Although there be a special contract, the party is not bound to resort to it, but he may declare on the *tort* and *say that the defendant has neglected to perform his duty.* The law raises an obligation on the defendant to do a particular act to-wit, to collect, or return the notes and he was guilty of a breach of that obligation. The plaintiff was given the liberty to consider the *breach of duty* as his gravamen, case was his appropriate remedy, though he might have sued in assumpsit."

In 1844 the Supreme Court of North Carolina, in the case of *Williamson vs. Dickens, 27 N. C., page 260*, in discussing the question of the plaintiff's right to declare in tort for breach of contract, says, "The plaintiff had his election to sue the defendant in assumpsit or in *tort* and he chose the latter." Commenting further upon this right of plaintiff, the Court, then presided over by Thomas Ruffin, Chief Justice, the most distinguished Jurist North Carolina has ever had, and one of the most eminent in American jurisprudence says, "*And all the Court agree that when the plaintiff has an election as to the form of his action, the choice of the action is decisive of the question.*"

The case of *Bond vs. Hilton*, reported in 44 N. C., page 308, was where plaintiffs brought suit in *tort* against the defendant who had taken charge of a cargo under a contract with plaintiff to sell same and report, that by his delay and mismanagement, considerable loss was snstained by the plaintiffs.

The Court below was of the opinion that the plaintiffs could not maintain their action against the defendant in tort and so held; but—

—*Upon Appeal, the Surpeme Court*, through its Chief Justice, says, "Upon the second branch of the inquiry, we are of the opinion the action is properly brought in *tort*. The plaintiff was entitled to *sue in tort*, and if the *evidence* showed that there had been *a breech of duty* on the part of the defendant in performing his contract, the plaintiff would have been entitled to a verdict. This was a matter of inquiry *for the Jury* under the proper instructions of the Court,"

It will be observed from an examination of the reports of the Supreme Court *of North Carolina*, that this doctrine, originating in England, was adopted by the State of North Carolina about sixty years ago, and has been without exception uniformly approved and followed by each succeeding Court up to the present time.

In the case of *Solomon vs. Bates*, 118 N. C., page 315, the Supreme Court expressly ratifies and approves each and every one of the foregoing cases, and adds the following comment, "while breach *of a duty* imposed by law arising upon a given state of facts is a *tort*, and yet even if there had been a special contract, or a statutory provision, the plaintiff might sue for *the negligence, in tort.*"

In reference to the opinion of the Court in *Fisher vs. the Water Company, reported* in 128 N. C., page 375, it will be observed that the Court again re-affirms and adopts the foregoing line of decisions and declares it to be a well settled and established rule of law and practice in North Carolina.

When the Water Company by and with the consent and approval of the petitioners, entered into the contract set out in the Record, it knew or ought to have known, that the well settled rule of law in North Carolina was that the Water Company could be held liable in *tort* for any *negligent omission* to perform the duties undertaken, or stipulated to be done in said contract, and that section 1255 of the Code of North Carolina, then enacted, provided that such judgment, when obtained, would take priority over their mortgages and bonds.—hence we do not see how the petitioners can complain of the application of the same principle to them, which has been invoked for half a century against the citizens of North Carolina.

The Supreme Court of the United States, in the case of Atlantic & Pacific R'y. Co. vs. Laird, 164 U. S., page 399, discussing the difference between causes of actions ex-delicto and excontractu says: "The distinction is this: If the cause of complaint be for an act af omission or non-

feasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty, apart from contract, to do what is complained of, exists) the... the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and defendant be such, *that a duty arises from that relationship* irrespective of contract *to take due care and the defendants are negligent*, then the action is one of *tort*." "So, in the case at bar, there was *a duty* shown independantly of contract, etc., etc."

Our case can be easily brought within the favorable application of this rule, when it is shown and admitted that the defendant Water Company was in the enjoyment of a *franchise* from the City of Greensboro, and by authority of which owed a *duty* to said city and its inhabitahts independent of said contract.

In the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., page 9, Mr. Justice Brown speaking for the Court says: "It is sufficient for the purpose of this case to say, that this Court has too often decided, for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants, through pipes and mains laid in the streets, upon the condition of the performance of these services by the grantee, is the grant of a *franchise* vested in the State in the *consideration of a performance of a public service.* It is true that in these cases a franchise was granted directly by the State Legislature, *but it is equally clear that such franchises mry be bestowed upon corporations by the municipal authorities.*

Again in *New Orleans Gas Light Company vs. Louisiana Light Mfg. Co.*, 115 U. S., page 650, the Court speaking through Mr. Justice Harlan, says, "The right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas, for public and private use, is a *franchise*, the privilege of exercising which, could only be granted by the State, or by the *municipal government* of that city acting under legislative authority."

"We have seen the manufacture of gas and its distribution for private and public use by means of pipes laid, under legislative authority, in the streets and ways of the city, is not an *ordinvry* business in which *every one* may engage, but is a *franchise* belonging to the government, to be granted, for the accomplishment of *public objects*, to whomsoever and

upon what terms, it pleases. It *is a business of a public nature and meets a public necessity* for which the State may make provision." (Italics ours.)

Dillon on Muni. Corp., 3 Ed., Sec 691.

A very able and exhaustive discussion upon the subject of the obligation undertaken by accepting a franchise may be found in *Haugen vs. Albina Light and Water Co.*, reported in 14 L. R. A. page 424, the Court there says; "As the defendant could not carry on the business of supplying water without the *franchise*, the city must have intended in granting such franchises to charge it with *the performance of the duty* it undertook for *the public* by the terms of this incorporation, and the defendant *in accepting the benefits of the grant must have assumed the performance of such duty*, in a word, the acceptance of a franchise under such contention carries with it the corresponding *duty* of *supplying the public* with the commodity which the incorporotion was organized to supply to all persons without discrimination."

To the same effect is the case of Griffith vs. Water Co.; 122 N. C., 206. It is respectfully submitted that the above authorities conclusively show that the Water Company clearly *owed a duty*, independent of the contract, to *perform the obligations which by its chrater and franchise it had undertaken to do.*

Their failure to do so under the foregoing decisions was a *breach of duty*, and at the same time a violation of the contract for which they could be sued *in tort* or contract.

There was an express contract as well as a legal obligation upon the part of the Defendant Water Company to provide and furnish ample protection against fire to the inhabitants of Greensboro, a breach of that obligation and a consequential damage to the respondents, as stated by the Supreme Court of North Carolina in Fisher vs. Water Company, 128 N. C., 375. The Court there says:

"Although action may have been maintained upon a promise implied by law, yet an action founded in *tort* was the proper form of action, and the plaintiff so declared. He stated the facts out of which the legal obligation arose fully, and also the obligation itself, and the breach of it, and the damage resulting from the breach."

(Attention is particularly called to the complaint filed in the Fisher case, found in the Record from pages 261 to 270,

Receiver appeared for the defendant company in said actions as attorney assisted by the able counsel who at present are arguing the case before this court, and who were likewise counsel for the bondholders, having therefrom drawn the bill upon which the United States Circuit Court appointed the receiver.

Further, that when the Superior Court rendered judgment adverse to the defendant company, the cases were prosecuted upon appeal to the Supreme Court of North Carolina and there re-argued; Having thus presented in the State Court every defense to which the company was entitled, and counsel for bondholders could imagine, and the same being decided adversely to it, we respectfully submit that they ought not, in the language of the late Chief Justice Pearson, of the Supreme Court of North Carolina, "be allowed to take two bites at the cherry".

Counsel for appellants in their brief suggest that the mortgages of the new and old company stand upon a different footing with regard to these judgments.

We do not understand that this question is really before the Court, as the Circuit Court did not desire instruction upon that question: It, doubtless, entertained the same view with relation thereto as is expressed in the opinion of Simonton, Judge, in this cause, wherein the Court held, that the new company was a re-organization of the old, and that by assuming the old mortgage debt by contract it became its real debtor and the bond holders its creditors. Should the Court, however, desire to review this branch of the case, we submit for its consideration the following:

First, What relation, in law, does the Greensboro Water Supply Company—the defendant company—sustain to the Greensboro Water Company, and what are the duties and obligations imposed upon, and assumed by, the Defendant Company?

Second, What relation does the Defendant Company occupy and sustain to the first mortgage creditors of the Greensboro Water Company, the payment of whose mortgage debt was assumed by the terms of the re-orgaization, at the time of the sale of the franchise and property of the Greensboro Water Company, to the Defendant Company?

We contend that the Greensboro Water Supply Company is nothing more or less than a re-organized corporation of the Greensboro Water Company, with the same name, except by the addition of the words " and" and "supply", with practically the same incorporators, embracing and operating substantially

the same corporate property, assuming the obligations, the public and private duties and the responsibilities of the old company operating and conducting its business under the franchise of the Greensboro Water Company (the old company), and is, to all intents and purposes, and in fact, the successor of the Greensboro Water Company (See Record, pages 93, 116, 117, and 221).

"When a new form is given to an old corporation or the same is re-organized under a new charter, taking in its new organization the place of the old one, embracing substantially the same incorporators, in the same territory, it will be presumed or held to be a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and is not, in law and in effect, a new and distinct creation of corporate capacity or liability."

Broughton vs. Pensacola, 102 U. S., 266 and 269.

It is submitted that the bondholders of the Greensboro Water Company occupy the same relations to the judgment claimants that the Greensboro Water Company itself would have occupied, and that the Greensboro Water Supply Company, in contemplation of law, as well as a matter of fact, occupies the same position that was occupied by the Greensboro Water Company; for a sale and transfer of coporate property under the circumstances of this case carry with it an obligation in law that the purchaser will assume the liabilities of the old company, and likewise become responsible to the public "to perform all such duties that would have been and should have been performed by the first corporation but for such sale and conveyance". This the new company undertook to do by executing a deed of trust upon its property and earnings, expressly assuming the indebtedness of the old company. (See Record).

This liability is further emphasized and declared by the Code of North Carolina, Sections 697 and 698, which are as follows:

Section 697. "If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property and there be a conveyance pusuant thereof, such sale and conveyance shall pass to the purchaser not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporatio may at that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the

purchaser the said corporation shall ipso facto be dissolved and the purchaser shall forthwith be a new corporation, by any name which shall be set forth in said conveyance or in any writing signed by him, and regarded in the same manner in which the conveyance shall be regarded".

Sec. 698. "The corporation created by, or in consequence of such sale and conveyance, shall succeed to all such franchises, rights and privileges and perform all such duties as would have been, or should have been, performed by the first corporation but for such sale and conveyance * * * *."

These provisions of law were enacted by the General Assembly of North Carolina in 1872, and brought forward and re-enacted in the Code of 1883; hence the stockholders, bondholders and other creditors of the Greensboro Water Company acted with full knowledge of the same, and they all joined in suit of Middendorf and others against the Greensboro Water Company, asking for the sale of its plant and consenting to and procuring a reorganization or merger of the new company, and the effect of such a merger or re-organization was to create a novation so far as the creditors of the old company were concerned and to substitute the new one as debtor for it.

> 2d. Cook S. & S., Sec. 669, note 3, 1st Spelling p'r Corporation, Sec. 93, and Friedenwald vs. Tobacco Works, 117 N. C., 544.

The bondholders and creditors of the old water company as party complainants asked for a sale of this property subject to the first mortgage lien of fifty thousand dollars ($50,000) and the sale was made in obedience thereto. The new company forthwith and immediately executed a deed of trust upon its plant and earnings to secure the interest of the first mortgage bonds of the old company, and thereafter the new company annually paid to the first mortgage bondholders of the old company their interest, and the same was by them regularly received. Surely as to the third parties the Water Company cannot deny its creditors, nor the creditors—the first mortgage bondholders of the old company—deny its acceptance of the new company as debtor.

The Supreme Court of North Carolina in the case of James vs. the Railroad Company, reported in the 121, N. C., Reports, p. 523, discusses at length the position which a purchasing company under a second mortgage subject to a prior mortgage occupies after its re-organization, in its relation to the public, and to

the original creditors of the first corporation, and upon that subject says:

"By the sale of the Special Master under the second mortgage, the purchase thereunder and the express assumption of the first mortgage debt binds the purchaser, the Southern Railway Company, for this debt. The Southern is in fact the mortgagor, in its relation to the Central Trust Company, of New York, the mortgagee of the first mortgage, and being in possession of the road, its property and franchise, has a right to run and operate the same, and this property will be held liable to the public for damages".

In Friedenwall vs. Tobacco Works, supra, where the succeeding corporation was sued for the debts of the old corporation, Avery, Judge, speaking for the Court, says:

"As the motives and objects of the old were substantially the same as those of the new association, and the latter was organized merely for the purpose of enlarging its business, it was not necessary to obtain the consent of the creditors of the former company to the change, as their rights continued with such merger or consolidation, the same against the new as against the old corporation."

The law treats the new organization, as to all intents and purposes, as the same body, still answerable for its contracts, although made under a different name. If the old company has ceased to exist and has been merged into the new, it has no separate entity. It is, in law, dissolved and cannot be made a party to this action.

Mr. Justice Day in delivering the opinion of this Court in the recent case of Julian vs. the Central Trust Company from North Carolina, Reported in 193 U. S., page 101, discussing the effect of section 697 of the Code of North Carolina, as applied in the case of James vs. the Railroad, supra, says:

"By the law of North Carolina the title to mortgaged premises is in the mortgagee. The Central Trust Company, the Trustee under the first and second mortgages, was a party to the foreclosure proceedings. It is estopped to dispute the effect of the decree, sale and confirmation, clothing the Southern Railway Company with the full title to the property and franchise to operate a railroad which had theretofore belonged to the Western North Carolina Railroad Company".

This opinion expressly rules the point sought to be raised by the appellants in this case.

CONSTRUCTION OF SECTION 1255 OF THE CODE OF NORTH CAROLINA.

That the mortgages of the old and re-organized Water Companies are void under Section 1255 of the Code of North Carolina as against the judgments of the intervenors.

Upon the construction of Section 1255 of the Code of North Carolina depends the judgment claimant's right to priority in this fund.

It is contended by counsel for petitioners, that the construction put upon this staute by his Honor, Judge Simonton, is a strained construction of that law, and not in hamony with the decisions of the North Carolina Courts.

It has been the policy of the State, through its legislature, since the beginning of its history, to subject the property of corporations to the payment of tort judgments irrespective of mortgages executed by such corporations; in fact, all such mortgages are declared to be void as against torts. As far back as 1798, the General Assembly saw fit to enact a statute (Section 685 of the Code of North Carolina) declaring, among other things, that all conveyances by corporations of their property, either absolutely or upon conditions, should be void as to torts committed prior to or at the time of conveyance, provided suit was instituted against the corporation within sixty days from the registration of such conveyance. The statute, it will be observed, gave releif against the corporation only up to the time of its making a deed of trust, etc., and did not afford any protection to the subsequent tort sufferer as against a recorded mortgage or deed of trust, executed prior to such inquiry. To remedy this condition and bind the property of the corporation for judgments recovered against them for torts committed subsequent to any and all mortgages and deeds of trust already executed, Section 1255 of the Code was enacted, which is in words as follows, to-wit:

Sec. 1255. "Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporation from execution for the satisfaction of any judgments obtained in the courts in this State for labor performed (nor for materials furnished such corporations), nor for torts committed by such corporation, its agents or employees, whereby any person is killed or any person or property injured, any

clause or clauses in such mortgage to the contrary notwithstanding."

(The words in brackets have since been eliminated.)

That hte purpose of the Legislature by this enactment was to afford protection for judgments of the nature and class herein contended for, is amply sustained by referencee to the decisions of our own Courts as well as by the decisions of the United States Circuit Court for the Fourth Circuit.

Chief Justice Furches, speaking for the Supreme Court of North Carolina, in the case of Coal Co. vs. the Electric Light Co., 118 N. C., 236, says:

"Section 1255 of the Code was enacted after Section 685 and could not have been intended to give the same relief that the latter gave, and it is equally certain that it was passed for the benefit of the class of persons mentioned in the enactment, and it is the duty of the Court to take into consideration the object for which it was passed and to construe it in that light.

Potters Dwarris on Statutes, page 128.

In construing this statute his Honor, Judge Simonton, speaking for the Circuit Court of the United States, said:

"Upon foreclosure of a railroad mortgage the judgment for personal injury will take precedence over the mortgage in the distribution of the proceeds of sale, and concluding the opinion, says: It appears to us that this judgment and the action thereon is protected by Section 1255 and should be paid in preference to the mortgage deed."

Finance Committee of Pennsylvania et al. vs. Railroad Company et al., 61, Fed. Rep. page 369, exparte Hudson.

This construction of the statute has been approved by numerous other cases by the same learned judge and has never been held in the fourth circuit to the contrary. It is a well settled rule of law that when sale under execution, or otherwise, is made of mortgaged property, the property still remains subject to the old mortgage in the hands of the new creditor, and if the beneficiary in the old mortgage dislikes his new debtor he has ample redress, to-wit: foreclosure; but if he prefers to continue the indebtedness with the new creditor, he must bear whatever burden the law imposes upon the property.

of citizens or inhabitants, are public, or *quasi public*, contracts; and that when such contracts are entered into and assumed by corporations, in consideration of special privileges, rights and franchises, granted either by the State or by a municipal corporation, *the law implies a duty to a person within the class referred to*, who is injured by the *negligent* performance of such duty thus owing, or, a *negligent failure to perform such duty* and such person thus iejured has his remedy at law for such *breach of duty*, or negligence, whether expressed in the contract or not, and, *if he sues in tort*, the *contract* may be considered *in aid* of such right.

In the case at bar our contention is, briefly, that the Water Company, by its acceptance of its franchise and taking by eminent domain, the exclusive use of the streets and public grounds of Greensboro for the purpose of furnishing the city and its inhabitants with a sufficient water pressure at all times to extinguish fires; that the law of the land, then and there, imposed upon the Water Company an obligation to perform this duty. That the Water Company emphasized and made certain this obligation and duty, by *entering into a contract with the City to do* certain things, among which we find the following:

"And said Water Company shall be responsible for all damages sustained by the City or any individual or individuals for any injury sustained from the negligence of said Company, either in the construction or the operation of the plant."

The gravamen of these actions is declared, as authorized by the leading authorities on tortuous actions, Cooley, Addison, Jaggard, Pollock and others.

We state the facts and circumstances out of which the action arose, the common law duty of the Water Company to comply with its public undertakings, its express contract to be liable to any person for negligence in operating its plant, and that for such undertaking has received many thousands of dollars annually from the city; that the Water Company has negligently failed to comply with its contract and to perform the obligations imposed upon it by law, independent of the contract, and that for the negligent non-performance of its legal duty and contract obligations the respondents were damaged.

Upon this statement of facts, which have been adjudged by

a Court and Jury of competent jurisdiction to be true; if the Water Company is not liable in damages for its gross negligence in failing to comply with its duties so owed, and whereby innocent parties have suffered, then it may be truthfully said that water companies enjoy privileges and immunities under the law to which every individual and all other corporations are strangers; and stand as a special ward of legal jurisprudence, defying all the laws of negligence, and ignoring every principle of liability, either in *contract* or *tort*.

Fortunately for respondents and for this Court, the Supreme Court of North Carolina has expressly determined the very points at issue, which results have been reduced to judgment, and that judgment is presented here for payment, with the request that it be accorded the same dignity and consideration by this Court rhat it would receive in the Courts of the State in which it was rendered.

Mr. Justice McKenna, in the case of Freeport Water Company *vs.* Freeport, reported in 180 U. S., page 595, in holding that this Court will be governed by the decisions of the Court of Illinois regarding the status of a water company, and its rights under a contract to furnish water to the inhabitants of a city in Illinois, quotes with approval the language of Mr. Justice Bradley in Burgess *vs.* Seligman, 107 U. S., 20, as follows:

"Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by ths Federal Courts, no less than by the State Courts themselves, as authorative declarations of what the law is."

And discussing further those cases in which a different rule has been established by the State Courts to that obtaining in the Federal Courts, and to which the United States Court is not bound to adhere, this learned Justice, concluding his observations. says:

"But even in such cases, for the sake of harmony, and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the

courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemingly conflict with the well-considered decisions of the State Courts."

AUBREY L. BROOKS,

Solicitor for Respondents.

Supreme Court of the United States.

No. 75.—October Term, 1905.

The Guardian Trust and Deposit Company and The Guarantee Trust and Deposit Company, Petitioners, vs. B. J. Fisher, A. M. Scales, Assignee of A. A. Hinkle; A. M. Scales, Assignee of Hodgin, Pegram & Co., and Helen G. Brown.	On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 2, 1906.]

Section 1255 of the Code of North Carolina of 1883 reads:

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the State against such incorporation, for labor performed [nor for material furnished such incorporation], nor for torts committed by such incorporation, its agents or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This was subsequently amended by leaving out the matter enclosed in brackets.

In 1887 a corporation was organized under the laws of North Carolina, which soon after secured the passage of an ordinance by the city of Greensboro, giving to it the exclusive right to the use of the streets, sidewalks and public grounds for the purpose of constructing, operating and maintaining a complete system of waterworks. A later ordinance provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant."

The corporation constructed the waterworks and also executed a mortgage or deed of trust, conveying its entire property and plant to secure the payment of fifty thousand dollars of bonds. A subsequent mortgage or deed of trust was foreclosed and the title to the property passed to a new corporation, subject to the lien of the first mortgage. After its purchase the new corporation executed a further mortgage or deed of trust. Subsequently two fires occurred, destroying property belonging to the respondents. Actions were commenced in the Superior Court of Guilford County by the

and particularly the Allegations 15, 16, 17, 18 and 19 of said complaint, which are embodied in the opinion of the Supreme Court of North Carolina, in said case, *supra.*)

The Greensboro Water Supply Company's liability in this case to the judgment claimants as inhabitants, property-owners and tax-payers in the City of Greensboro is based upon two-fold ground:

First.—Corporations enjoying public franchises and engaged in public employment, for which they receive toll, owe a duty to the public as well as to each *individual*, to perform the duties undertaken and incident thereto, which duty, in this case, was almost exclusively to furnish a sufficient *pressure* of water to extinguish fires.

Second.—This obligation, raised by the law, is added to and superinduced by the provisions of the contract under which the corporation is acting.

It will hence be observed that the causes of action upon which respondents' judgments are based do not rest merely upon a negligent breach of the contract, but also a negligent *non-performance* of a common law duty imposed and stamped upon a *quasi* public corporation which undertakes for a profit to carry on a business; and we maintain that the complaints filed in the respondents suits in the State Courts allege facts sufficient to sustain an action in *tort* even independent of the contract.

Perhaps the clearest statement of the law giving respondents right to sue in *tort* upon a breach of contract is found in Addison on Torts, Wood's Edition, Section 1288:

"Where a contract creates a duty, the *neglect to perform that duty*, as well as the negligent performance of it, is a ground for action of *tort*. Both the non-feasance and misfeasance constitutes a wrongful act for which the remedy is by action of contract, or of tort *at the opinion of the party injured.*"

And at Section 27, of the same work, it is said:

"A tort may be dependent upon or independent of contract. If a contract imposed a legal duty upon a person, the *neglect* of that duty is a tort founded upon contract, so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for a breach of duty, may be brought at the *option* of the plaintiff."

Following are the definations of tort as given by the leading authors on that subject:

"Tort is an act or *omission* (not being merely a breach of

a duty arising out of a personal relation or undertaken by a contract) which is related to harm suffered by a determinate person in one of the following ways:

"*a.* It may be an act in itself contrary to law, or an *omission* of specific duty which causes harm not intended by the person so acting or *omitting*.

"*b.* It may be an act or *omission* causing harm which the person so acting or omitting did not intend to cause, but might or should, with due dilligence, have foreseen and *prevented*.

"*c.* It may, in special cases, consist merely in *not avoiding or preventing harm* which the party was bound absolutely, or within limits, to avoid or prevent."

Webb's Pollock on Torts, 20.

Bigelow on Torts, at page 11, classifies the subject as follows:

1. The doing of a lawful act by unlawful means.
2. The doing of an unlawful act.
3. Events or conditions caused by *neglect or breach of duty*.

It is the latter class of torts which is the basic principle of the respondents cause of action.

"Where a body of persons, incorporated or not, are entrusted with the management or maintenance of work, or the performance of duties of a public nature, they are, in their corporate or *quasi* corporate capacity, responsible for the proper conduct of their undertaking no less than if they were private owners, and this whether they derive any benefit from the undertaking or not.

Webb's Pollock on Torts, pages 69 and 70, and cases cited.

We have seen that from the relation of the Water Company as a *quasi* public corporation to the inhabitants of Greensboro it assumed certain common law obligations by reason of its right of eminent domain, public employment and compensation derived from the tax-payers of the City of Greensboro independent of any contract, and a non-performance of these public duties, whereby injury results to person or property *is a tort*.

"Whenever facts and circumstances can be shown to exist

which creates a duty on the part of the defendant towards the plaintiff, and there has been a breach of that duty and a consequent damage to the plaintiff, an action for damages may be maintained." (See Addison on Torts, Section 28.)

"When a contract has created a duty between the parties and privies, a breach of which is actionable, * * * but in addition to this the contract is either repeated or put in force, the common law duty covering the relation or situation, a party or *privy* to the contract may sue *ex contracu* for the breach of contract, or *ex delicto* for a breach of the common law duty. There is a body of law outside of the agreement of the parties prescribing the rights and defining the duties not directly contemplated by the party, but a breach of which is actionable as a tort." Jaggard on Torts, pages 23 and 28.

The petitioners contend that because there was a contract between the Water Company and the city which has been violated, that the respondents could not maintain an action for tort, but can only sue for breach of contract. In answer to this, Jaggard on Torts, page 24, very well says: "The law does not allow a party to use a violation of a contract obligation as an instrument of oppression and damage to accomplish his purpose, and then to interpose his contract as a limitation of his liability."

Did the Water Company owe the respondents a duty? Did it *negligently* fail to perform *that duty?* and what was the duty to be performed, a breach of which is complained of?

The duty owed is specifically set out in paragraphs 3, 5, 6, 15 and 19 of the complaint filed in the case of Fisher *vs.* The Greensboro Water Supply Company heretofore reported.

Did the defendant fail to perform that duty whereby the plaintiff was injured? The verdict of the several juries who tried these cases have settled this question. In their findings four contentions have been conclusively settled:

First.—That the Water Supply Company had broken its contract with the city.

Second.—That it had failed to perform the public duty which it owed to the respondents as inhabitants of the City of Greensboro, to furnish water for fire protection.

Third.—That it has negligently failed to do so.

Fourth.—That the respondents have been thereby damaged in the amount set out in the judgments filed in the Record.

The case of Boston Safe Deposit and Trust Company *vs.* the Salem Water Company, 94 Federal Reporter, 240, and

cases therein cited is made the basis of the petitioners' contention, that these actions cannot be sustained in *tort*. By examination of that case the Court will find that it differs totally from the question at issue, in that the Court says that the action was simply *ex contractu*, and that there was *no contract* between the Water Company and the plaintiff entitling him to sue for its breach.

In the case at bar it is admitted by counsel representing petitioners that the Supreme Court of North Carolina in the case of Gorrell *vs.* the Water Company reported in 124 N. C., 328, has expressly held that where a corporation undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, and received compensation therefor, that damages sustained by a citizen and tax-payer by a destruction of buildings on account of the failure to furnish water, is a natural and proximate consequence of such breach or undertaking between the Water Company and the City, and entitles the tax-payer to sue in his own name for its breach, the contract having been made for his benefit.

In the case of Coy *vs.* Indianapolis Gas Company, 36 L. R. A., page 535, the question at issue was very nearly identical with the one under consideration. There the Gas Company had agreed to furnish gas under a contract for fuel, and negligently failed to do so whereby a child died from cold. The plaintiff in that case sued for the negligent nonperformance of the contract, and also for the negligent nonperformance of the common law duty which it had assumed by accepting its franchise and assuming this public duty. The point was there raised as here, that the action was *one in contract* and *not in tort*.

The Court in a very able opinion upon this point says:

"The failure of *duty* on the part of the company as alleged in the complaint *is a tort*, even though the complaint also shows the failure to comply with the contract. The contract was but a statement of the reasonable conditions under which the company was required to perform its duty. The authorities show that in such a case the action may be *on contract or in tort*. The necessary statement of facts being substantially the same in either case, the failure to perform such a contract is in itself *a tort*. The action in this case is therefore *in tort*."

Second Addison Contracts, 1119.
48 American Reports, 179.
94 Ind., 474.
Brown *vs.* C., M. & St. P. R. Co., 41 American Reports, 41.

National Bank *vs.* Graham, 100 U. S., page 702, was a case where a depositor put bonds in a bank for safe keeping, and and were accidently stolen. Graham sued the bank *in tort* for its negligence. The Court discussing the cause of action says:

"In many cases where there is a valid contract it may be regarded only as an inducement and raising a duty for the breach of which an action may be brought *ex contractu* or *ex delicto* at the option of the injured party."

It is therefore seen that the respondents were entitled to maintain their action in the State court against the Water Company as *privies to the contract* between the Water Company and the City, and also upon a *breach of the common law duty* which the Water Company owed them as inhabitants and tax-payers of the City of Greensboro, belonging to a class to whom they owed a duty implied by law, as well as expressly assumed by contract.

In all of these cases the State Court declared that the plaintiffs were entitled to judgment against the defendant Water Company for the *tortious* injuries and damages done by *the negligence* of the defendant.

In Paducah Lumber Company *vs.* Paducah Water Supply Company, 89 Ky., 340, it is held that if a water company entered into a contract with a municipal corporation whereby the former agrees in consideration of the grant of franchises, and a promise to pay certain specified prices for the use of hydrants, to construct water works of a specified character and capacity and to keep a supply of water required for domestic, manufacturing and fire protection purposes for all the *inhabitants* and *property of the city*, the tax-payer of the city may recover of the Water Company when through a *breach of its contract* he is left without means of extinguishing fire, and his property is on that account destroyed.

This case was twice decided in the Supreme Court of Kentucky and has since been affirmed by said Court in a similar case.

The Supreme Court of North Carolina has recently passed

twice upon the validity of the cause of action upon which the judgments of the Intervenors are based.

First—In the case of Gorrell *vs.* The Water Company, 124 N. C., at page 386. This was an action brought by the plaintiff against the Water Company—(the defendant in the main case)—for injuries to property. It demurred to the complaint and the demurer was overruled by the Supreme Court, which decided that a cause of action was stated and that the plaintiff, being privy to the contract between the Water Company and the City of Greensboro, could maintain the action.

Second—In the Fisher case, 128 N. C., page 375, by the *unanimous* opinion of the Supreme Court, it was held that the plaintiff had a cause of action, and that the action was brought *in tort*. Numerous authorities, including eminent works on pleadings, were cited in support of the decision of the Court. The defendant company in that case did not dispute the *right of the plaintiff to sue*, nor did they deny that he had *a cause of action*, but filed an answer controverting the facts upon which his cause of action was based. These facts were submitted to a jury upon a trial and found in favor of the plaintiff, and upon this finding of the jury these judgments are based, as fully appears from the Record filed in this cause.

In addition to this, the attention of the Court is, with great confidence, called to the fact that so learned and eminent a Judge as His Honor, Judge Simonton, after a thorough and careful investigation of the question, has filed an opinion in this cause, concurred in by His Honor, Judge Boyd, wherein the doctrine held both by the Kentucky and North Carolina Courts is upheld, and in support of his conclusions, not only these cases, but the common law doctrine hereinbefore enunciated, is fully set out.

The diligence and industry of the learned counsel for the appellants have not been rewarded by the discovery of any authority from law writers or Courts cited by them in their Brief, which controvert in the least the soundness of the doctrine laid down by Judge Simonton, as well as the Supreme Courts of Kentucky and North Carolina.

The text books, as well as the decisions of the courts of the country, lay down the doctrine, without a single exception, that:—

All contracts which have for their object private gain, and, at the same time, embrace duties and obligations of a public nature, whether to the public at large or to a particular class

owners of the property destroyed against the new corporation and judgments recovered, the judgment entries each reciting that the recovery was "for the injury and damage done him by the negligence of the defendant." 128 N. C. 375. Proceedings having been commenced in the Circuit Court of the United States to foreclose the existing mortgages, a decree was entered and a sale made. Thereupon the judgment creditors intervened, insisting that in the distribution of the proceeds they were entitled to priority over the mortgage liens by virtue of the statute above referred to. The Circuit Court decided in their favor. 115 Fed. Rep. 184. Its judgment was taken on appeal to the Court of Appeals, from which court the case was brought here on certiorari.

Mr. Justice BREWER delivered the opinion of the Court.

It is contended that neither the plaintiff in the pending suit nor the bondholders whom it represents were parties or privies to the actions in the State court; that therefore the judgments of the latter court were not conclusive in the foreclosure proceeding as to the nature of the causes of action; that whether they were for torts or breaches of contract is for the determination of the Federal court, and further, that when the property passed from the old to the new water company it passed subject to the fifty-thousand dollar mortgage, and that under this statute, if applicable at all, only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence. On the other hand, it is contended that the statute deals with judgments—not claims for damages caused by negligence; that the decision of the State court as to the nature of the cause of action is as much a part of the judgment as the determination of the amount to be recovered; that a judgment which in terms is for damages caused by negligence, if entered by a court having jurisdiction, is made by the statute superior to any mortgage; that by the mortgage the mortgagee and the bondholders it represents agree to accept such judgment as conclusive and to subordinate their mortgage to its lien; that to hold that the transfer of property incumbered by a mortgage from one company to another puts that mortgage outside the statute practically destroys its beneficial intent; that such has been the holding of the Supreme Court of the State, and is a holding which the Federal courts will follow.

We shall assume, without deciding, that the nature of the causes of action upon which the State judgments were rendered is open for consideration in the Federal court in the foreclosure proceeding. The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts

stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or if not conclusive, at least *prima facie* evidence. In this foreclosure proceeding the record of the proceedings in the State courts was introduced in evidence. Taking the Fisher case, for illustration, the complaint set out fully the contract made between the city of Greensboro and the water company, and the proceedings by which the title to the property passed from the one company to the other; alleged the destruction by fire of the plaintiff's property, and that he was free from all negligence in the matter. It added:

"The plaintiff alleges that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the city of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the city of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city."

It then set forth as matters of negligence on the part of the water company the "carelessly, wilfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said city of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied;" also a failure "to keep its pumping engine ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned;" and closed with this averment: "That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor."

The answer consisted mainly of denials in separate paragraphs of the averments in corresponding paragraphs of the complaint, specifically denying the validity of the contracts between the city and the original water company. Questions were submitted to the jury and answers returned, establishing the making of the contracts, the attempt on the part of the company to perform its stipulations, its failure to do so successfully, and also that the plaintiff was injured by the negligence of the defendant.

Upon this record the Supreme Court of North Carolina ruled that the action was one in tort, saying:

"We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff *so declared.* He stated the facts out of which the legal obligation arose, fully, and also the obligation itself, and the breach of it and the damage resulting from that breach. Chitty on Pleading, vol. 1, page 155; Thompson on Corporations, vol. 5, sec. 6340." *Fisher* v. *Greensboro Water Supply Company,* 128 N. C. 375, 379.

From the conclusion thus reached we are not inclined to dissent and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested and for negligence in which he is liable in damages to such other parties. A company is chartered to construct and operate a railroad. Proceeding thereunder it constructs and operates its road. Nothing may be said in the charter in reference to the manner in which the road shall be operated or the particular acts which it must do. Yet without any such specification it is under an implied obligation to exercise reasonable care in both construction and operation. If from undue speed, failure to give proper warnings, or other like acts or omissions, individuals are injured, they may recover for such injuries, and their actions to recover sound in tort. Doubtless in the same transaction there may be negligence and breach of contract. If a railroad company contracts to carry a passenger there is an implied obligation that he will be carried with reasonable care for his safety. A failure to exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort. But where there is no contract, and the injuries result from a failure of the corporation to exercise reasonable care in the discharge of the duties of its public calling, actions to recover therefor are strictly and solely actions *ex delicto.* Pollock, in his treatise, groups torts into three classes, in the last of which he specifies "breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings." Webb's Pollock on Torts, p. 7. This, it is said, implies the existence of some absolute duty not arising from personal contract with the other party to the action.

And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no

greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. "The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby." *Osborne* v. *Morgan*, 130 Mass. 102, 104. See also *Emmons* v. *Alvord*, 177 Mass. 466, 470. An individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation, in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. Holmes on the Common Law, p. 278. Even if the water company was under no contract obligations to construct waterworks in the city or to supply the citizens with water, yet having undertaken to do so it comes under an implied obligation to use reasonable care, and if through its negligence injury results to an individual it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort and not for breach of contract.

With reference to the contention that only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence—a contention which, if sustained, would result in

giving priority to the fifty-thousand dollar mortgage—the argument is that by the statute "mortgages of incorporate companies . . . shall not have power to exempt the property or earnings of such incorporations . . . for torts committed by such incorporation;" that the torts were committed by the second water company; that its purchase was of the property of the first company, subject to the fifty-thousand dollar mortgage, and therefore over that property thus encumbered, and that only, were the judgments given priority. There is, doubtless, force in this contention. But this is not a penal statute, to be construed strictly, but remedial in its nature, and to be construed liberally, to carry into effect the intention of the legislature and provide the adequate remedy which it intended. The obvious purpose was to make the corporate property situate in the State security against torts committed by its owner, and it would materially impair if not wholly destroy the statute, and thus set at naught that purpose if the corporation constructing the plant could place a mortgage thereon for its entire value and then by sale to a new corporation enable the purchaser to use that property discharged of all substantial responsibility. In reference to a kindred question arising under the same statute the Supreme Court of North Carolina said in *Railroad Company* v. *Burnett*, 123 N. C. 210, 214, that under such construction "this statute would be a false light held out to such claimants to induce them to furnish material and labor—thinking they had a security, when in fact they had none."

It is more reasonable to hold that the statute imposes upon the investment made by a corporate company in its plant a responsibility for torts committed by it or any subsequent corporate owner, and that that responsibility cannot be avoided by any mortgage or other incumbrance voluntarily placed upon the property. Security to the individual citizen is to go hand in hand with the franchise and privilege granted by the State. We see no other question requiring notice, and the decree of the Circuit Court is

Affirmed.

Mr. Justice WHITE, Mr. Justice PECKHAM and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.